TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 44

CHARLES PEYTON WEST AND MAURICE JOHN WEST, PETITIONERS,

vs.

AMERICAN TELEPHONE AND TELEGRAPH CO.

No. 45

CHARLES PEYTON WEST AND MAURICE JOHN WEST, PETITIONERS,

vs.

AMERICAN TELEPHONE AND TELEGRAPH CO.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 9, 1940.

CERTIORARI GRANTED MAY 6, 1940.

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CAPTION.

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, SS:

Record of the proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio in the cause and matter hereafter stated. Said action was commenced on the 14th day of July, 1937 and proceeded to final disposition on the 2nd day of July, 1938, and during the progress thereof pleadings and papers were filed, process was issued and returned and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

Present: THE HONORABLE S. H. WEST,
United States District Judge.

CHARLES PEYTON WEST
MAURICE JOHN WEST

vs.

THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY.

No. 5622 EQUITY.

BILL OF COMPLAINT.

(Filed July 14, 1937.)

To the Honorable Judges of the District Court of the United States, for the Northern District of Ohio, Eastern Division:

Plaintiff, Charles Peyton West, is a citizen of the State of Pennsylvania.

Plaintiff, Maurice John West, is a citizen of the State of Ohio.

Defendant, The American Telephone and Telegraph Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen of said state, and is qualified in and doing business in the State of Ohio.

This Court has jurisdiction of this action for the following reasons:

(1) This controversy is between citizens of different states, as above set forth;

(2) The value of the matter in controversy herein exceeds the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

The ultimate facts upon which plaintiffs ask relief are as follows:

1. Plaintiffs are the sons and only children of Charles P. West, Deceased, who died on March 21, 1926, leaving a Last Will and Testament which was admitted to probate and record in and by the Probate Court of Cuyahoga County, Ohio, as shown in Cause No. 154,617 of Docket No. 191, of said Probate Court.

2. By the terms of said Last Will and Testament, Charles P. West, Deceased, gave, devised and bequeathed to his widow, Grace C. West, the use and income of his property for the period of her natural life, and directed that after the death of his said wife all of his property be divided equally between the plaintiffs, share and share alike. Said Will nominated said Grace C. West as Executrix thereof, and she was duly appointed and qualified as such Executrix.

3. At the time of his death said Charles P. West was the owner of Ninety-two (92) shares of the capital of the defendant. After his death, the defendant caused or permitted the transfer of the certificates for said shares previously in the name of said Charles P. West, to Grace C. West, without regard or reference to the limitations placed

upon her estate or interest in said shares, or the limitations contained in the Will of said decedent, or the rights or interests of the plaintiffs in and to said shares, although the defendant had theretofore received and was then possessed of a copy of said Will of said decedent, duly certified by said Probate Court as a true copy thereof, and well knew the terms and conditions thereof, and of the qualified rights and interest of Grace C. West in and to said estate, and of the rights and interests of the plaintiffs therein.

4. Thereafter, prior to November 2, 1929, wholly without the knowledge of or consent of these plaintiffs or either of them, said Grace C. West in the State of Massachusetts assigned and delivered said certificates for Ninety-two (92) shares so issued to her to Paine, Webber & Company, stock brokers of New York City; said Paine, Webber & Company was a purchaser for value of said Ninety-two (92) shares in good faith and without notice of the rights and interests of the plaintiffs therein.

5. On November 2, 1929, the defendant, with full knowledge of and without further inquiry as to the rights and interests of plaintiffs, and without securing their consent as required by said Will, transferred said shares and registered same on its books in the State of New York to said Paine, Webber & Company.

6. Plaintiffs had no knowledge of said wrongful acts of the defendant and of Grace C. West until March, 1934.

7. Plaintiffs about June 2, 1934, filed an action against the defendant for the recovery of their said loss, being Cause No. 408,792 of the Docket of the Common Pleas Court of Cuyahoga County, Ohio, and said Court, upon final hearing, entered judgment for the plaintiffs; and on review of said cause by the Court of Appeals of Cuyahoga County, Ohio, in Cause No. 15504 of the Docket of said Court of Appeals, the Court of Appeals reversed said judgment upon the ground that plaintiffs had failed to demand of the defendant the return of the certificates representing said shares of capital.

8. On January 20, 1937, the Supreme Court of Ohio overruled plaintiffs' motion to certify the record of said cause.

9. Accordingly, on June 18, 1937, the plaintiffs made a demand on the defendant to restore said shares and to pay them the dividends thereon from November 2, 1929, with interest at 6% on said dividends, and to pay for the difference in market value of said shares between the highest intermediate market value during the interval from Novem-

ber 2, 1929, to the date of the demand, and the market value at the time of the demand, with interest thereon at 6% from the date of said demand, and further demanded that without waiving any rights or remedies or in any way limiting the extent or amount of any right of action or right of recovery which they at the time or thereafter might have against defendant by reason of said wrongful transfer, defendant restore to them whatever rights or remedies they may theretofore have had, may then have had, or may thereafter have by reason of said wrongful transfer.

10. Prior to November 2, 1929, that is, at the time of said unlawful assignment and sale of said shares by Grace C. West to said Paine, Webber & Company in the State of Massachusetts, such act of sale and assignment, by and according to the law of said State of Massachusetts, as announced in the cases decided in said State, terminated the use and possession of Grace C. West as life tenant and invested these plaintiffs as remaindermen with the immediate use and possession of said shares.

11. On November 2, 1929, that is, at the time defendant wrongfully registered and transferred said Ninety-two (92) shares to said Paine, Webber & Company, in the State of New York, the owner of shares of stock, was entitled, by and according to the decisions of the courts of said state, in case of wrongful registration of transfers of corporate shares, not only to restoration of the shares with all mesne dividends thereon, but also to the difference in market value between the highest intermediate value and the value at the time of the demand, with interest on such difference.

WHEREFORE plaintiffs pray for an order requiring the defendant to issue and deliver to the plaintiffs a certificate for Ninety-two (92) shares of the capital stock of the defendant; for an accounting from the defendant for all dividends paid on said stock since November 2, 1929, and interest thereon, and for damages representing the difference in market value of said shares between the highest intermediate value and its value at the time of said demand with interest thereon from the time of said demand; that the defendant be required and ordered to restore to plaintiffs whatever rights or remedies they may heretofore have had or may now or hereafter have by reason of the acts of the defendant hereinbefore complained of; that the Court determine and declare the rights and obligations of the parties hereto, and for such other and further relief as justice and equity may require.

Further plaintiffs pray that the Clerk issue a subpoena upon the defendant The American Telephone and Telegraph Company.

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,
Attorneys for Plaintiffs.

(Duly Verified.)

ANSWER.

(Filed September 15, 1937.)

Now comes the defendant, The American Telephone & Telegraph Company, and admitting the citizenship of the plaintiffs and the defendant as alleged, that the defendant is qualified in and doing business in the State of Ohio and that the controversy is between citizens of different states involving an amount in excess of $3,000.00, exclusive of interest and costs as alleged, for its answer herein says:

FIRST DEFENSE

1. For its first defense the defendant avers that the plaintiffs' alleged cause of action accrued more than four years prior to the filing of the plaintiff's petition herein and is barred by the statute of limitations prescribed by the General Code of Ohio.

SECOND DEFENSE

2. For its second defense the defendant avers that on June 2, 1934, the plaintiffs herein filed a petition in the Court of Common Pleas of Cuyahoga County, Ohio, against the defendant herein, said cause being No. 408,792 on the docket of said court.

3. In said petition the plaintiffs alleged in substance as follows: The plaintiffs are the sons and only surviving

children of Charles P. West, deceased, who died March 21, 1926, leaving a Last Will and Testament admitted to probate in the Probate Court of Cuyahoga County, Ohio, in accordance with docket No. 191, No. 154,617. By the terms of said will Charles P. West bequeathed to his widow, Grace C. West, the use and income of all his property for the period of her natural life and after her death directed that said property be divided between the plaintiffs. Grace C. West was nominated as Executrix, qualified and acted as such. Charles P. West at the time of his death was the owner of 92 shares of the capital stock of the defendant. On January 14, 1927, without the knowledge of the plaintiffs, defendant wrongfully permitted the certificates for said shares to be transferred to Grace C. West without limitation. The defendant knew the terms and conditions of the will of Charles P. West and of the limitations upon the estate of Grace C. West. On November 4, 1929, without the knowledge or consent of the plaintiffs, the defendant wrongfully permitted the sale and transfer of said 92 shares of its common stock by Grace C. West to persons unknown. Plaintiffs have no knowledge of these wrongful acts of the defendant prior to March, 1934. The defendant was at all times informed as to the nature of the interests of Grace C. West and of the plaintiffs in said shares of stock and that as a direct and proximate result of the defendant's wrongful acts the plaintiffs were damaged in the amount of $25,000. The prayer of said petition was for damages in the sum of $25,000, with interest from November 4, 1929.

4. Thereafter the defendant filed an answer substantially as follows: For its first defense the defendant alleged that on January 14, 1927, Grace C. West duly filed in the Probate Court of Cuyahoga County, Ohio, an application reciting that the debts of said estate had been paid; that there remained in her hands, among other stock, 92 shares of the common stock of this defendant; that all of said stocks were bequeathed to Grace C. West for and during her natural life and asking the Court to transfer said stock to her. The plaintiffs consented to such distribution in writing, and thereupon said Probate Court issued its order whereby it granted said application and authorized said Grace C. West to "distribute in kind and transfer unto herself as the widow of said Charles P. West, deceased, and the distributee entitled thereto, the aforesaid stocks, as prayed for." The plaintiffs knew of and consented to the making of said order and the disposition of said stock to Grace C. West. Shortly thereafter Grace C. West tendered to the defendant certificates of stock for 92 shares, duly endorsed

by her as Executrix, and requested the issuance of a new certificate for said shares in her name and submitted therewith among other papers a copy of the will of Charles P. West, deceased, a copy of her letters of administration, a copy of said application for distribution and a copy of said order of the Probate Court directing distribution and thereupon the defendant issued a new certificate to her. On or about November 4, 1929, said certificate of stock for 92 shares was delivered to the defendant by Paine, Webber & Co., brokers, with offices at 25 Broad Street, New York City, with a power of attorney attached duly executed by Grace C. West, assigning and transferring said stock to Paine, Webber & Co. Thereupon the defendant transferred said stock in accordance with said assignment and in conformity with the Uniform Stock Transfer Act of the State of New York. It was further alleged that Grace C. West was still living. Other than as admitted the allegations of the petition were denied.

5. By way of second defense defendant averred that the will of Charles P. West contained no provision for a trustee of his property and gave his widow, Grace C. West, possession of all property during her life without requiring her to furnish any bond; that in such case it was the uniform practice of the Probate Courts of Ohio to order distribution of personal property to the life tenant without requiring a bond and to direct shares of stock to be transferred to the name of the life tenant without limitation; that this practice was known to the plaintiffs; that the plaintiffs knew of the intention of the Executrix to make distribution in conformity with said practice and that the plaintiffs expressly consented in writing to such distribution. The plaintiffs made no request at any time that said certificates be transferred in such form as to set forth the life tenancy of Grace C. West and made no application at any time to the Probate Court to require the said Grace C. West to execute in their favor a refunding bond or other security for their protection in the event that said Grace C. West converted said stocks to her own use. The defendant transferred said stock to Grace C. West in her individual name, relying upon the order of the Probate Court directing such distribution, and upon the conduct of the plaintiffs as previously set forth, and that in consequence the plaintiffs are estopped to deny the legality and propriety of said transfer.

6. For its third defense the defendant alleged that the cause of action accrued more than four years prior to the

filing of the plaintiffs' petition and was barred by the statutes of limitations as provided by the General Code of Ohio.

7. By way of reply the plaintiffs filed a general denial.

8. Said cause was thereafter tried in the Court of Common Pleas on the evidence and judgment was rendered in said court in favor of the plaintiffs. Said judgment was thereafter reviewed and reversed by the Court of Appeals of Cuyahoga County and final judgment was rendered by said Court of Appeals in favor of the defendant herein. A true copy of the final entry in said cause is hereto attached marked "Exhibit A."

9. Thereafter the plaintiffs duly filed a motion in the Supreme Court of Ohio to require said Court of Appeals of Cuyahoga County to certify its record in said cause. The plaintiffs alleged in said motion that the Court of Appeals had reversed a judgment of the Common Pleas Court in favor of the appellants and entered "final judgment against the appellants (plaintiffs herein) and in favor of appellees (defendant herein)." The plaintiffs in said motion further alleged that there was "probable error" in the proceedings of said Court of Appeals. After hearing the Supreme Court of Ohio denied said motion to certify. All issues now sought to be raised by the bill of complaint filed herein were thus finally and fully adjudicated between the parties hereto and said final judgment is a bar to this proceeding.

THIRD DEFENSE

For its third defense the defendant—

10. Admits the allegations of paragraph 1 of the bill.

11. Admits the allegations of paragraph 2 of the bill.

12. Answering paragraph 3, admits that at the time of his death Charles P. West was the owner of 92 shares of the common capital stock of the defendant and avers that on or about January 14, 1927, Grace C. West filed in the Probate Court of Cuyahoga County, Ohio, an application reciting that the debts of said estate had been paid; that there remained in her hands, among other stocks, 92 shares of the common stock of this defendant; that all of said stocks were bequeathed to her for and during her natural life and asking the Probate Court to transfer said stocks to her; that the plaintiffs consented to such distribution in writing; that thereupon said Probate Court issued its order whereby it granted said application and authorized said Grace C. West to "distribute in kind and transfer unto her-

self as the widow of said Charles P. West, deceased, and the distributee entitled thereto the aforesaid stocks, as prayed for''; that the plaintiffs knew of and consented to the making of said order and to the transfer of said stock to said Grace C. West without limitation; that shortly thereafter Grace C. West tendered to the defendant for transfer certificates for said 92 shares of stock, duly endorsed by her as Executrix of the estate of Charles P. West, deceased, and requested the issuance of a new certificate for said amount in the name of Grace C. West; that she submitted therewith duly certified copies of the will of Charles P. West, deceased, of her letters of administration and of said application for distribution with the consent of the plaintiffs endorsed thereon, and of the order of said Probate Court directing distribution to her, and that thereupon and relying thereon this defendant issued a new certificate of common stock in her name without limitation. Other than as herein admitted or otherwise expressly averred defendant denies the allegations contained in paragraph 3 of the bill.

13. Answering paragraph 4 of the bill the defendant avers that on or about November 4, 1929 said certificate for said 92 shares of stock was delivered to the defendant in New York by Paine, Webber & Co., brokers with offices at 25 Broad Street, New York City, with power of attorney attached, duly executed by Grace C. West, assigning and transferring said stock to said Paine, Webber & Co. Defendant admits that Paine, Webber & Co. was a purchaser for value of said 92 shares in good faith and without notice of the rights and interests of plaintiffs therein. Except as herein admitted or otherwise alleged the defendant denies the allegations of paragraph 4.

14. Answering paragraph 5 of the bill the defendant avers that on November 4, 1929, at the request of Paine, Webber & Co. and in accordance with the authority contained in the papers referred to in paragraph 4 hereof, it transferred said shares and registered the same on its books in the State of New York as requested by said Paine, Webber & Co. Otherwise than as herein alleged the defendant denies the averments contained in paragraph 5 of the bill.

15. The defendant denies the allegation contained in paragraph 6 of the bill.

16. Answering paragraph 7 of the bill the defendant admits that the plaintiffs filed an action in the Court of Common Pleas of Cuyahoga County, Ohio, as alleged; ad-

mits that upon final hearing the Common Pleas Court entered a judgment for the plaintiffs; admits that on review of said cause by said Court of Appeals of Cuyahoga County, Ohio, the Court of Appeals reversed said judgment; denies that it reversed said judgment upon the ground that the plaintiffs had failed to make a demand upon the defendant and avers that said Court entered final judgment in favor of this defendant as more fully set forth in the Second Defense herein.

17. The defendant admits the allegation contained in paragraph 8 of the bill.

18. Answering paragraph 9 the defendant admits that on June 18, 1937, the plaintiffs made a demand upon the defendant but begs leave to refer upon trial to an exact copy of that demand for the terms and conditions thereof.

19. The defendant denies the allegations contained in paragraph 10.

20. The defendant denies the allegations contained in paragraph 11.

21. The defendant further avers that Grace C. West was living at the time of filing the bill of complaint herein.

FOURTH DEFENSE

Referring to the admissions and denials contained in its third defense herein the defendant incorporated the same and for its fourth defense avers:

22. At the time of distribution of the estate of Charles P. West in 1927 the plaintiffs, then more than twenty-eight years of age, were making their home with their stepmother, who was also their aunt, Grace C. West. They knew or are charged with knowledge of the manner in which she distributed the estate of Charles P. West. At no time did the plaintiffs apply to the Probate Court of Cuyahoga County to require Grace C. West to put up a redelivery bond or to give other security for the handling of an estate of approximately $40,000. In 1927 this estate, partly in cash, partly in notes and partly in stock, was distributed in practically its entirety to Grace C. West without any bond being required of her either by the terms of the will of Charles P. West or at the request of these plaintiffs. They consented to the orders of distribution for which she asked, hereinbefore referred to. They collected and transferred to her substantial amounts of cash that belonged to the estate without requiring any security for its redelivery. They made no inquiry at any time between January, 1927,

and November, 1929, when if notified the defendant might have protected itself against the claim now made, either of the defendant or of Grace C. West as to the manner in which this stock had been distributed and transferred. By reason thereof the plaintiffs are guilty of the grossest laches and are now estopped to deny the legality and propriety of said transfer and from making each and several the claims asserted herein.

WHEREFORE, having fully answered, the defendant prays that it may go hence with its costs.

TOLLES, HOGSETT & GINN,
WILLIAM B. COCKLEY,
Attorneys for the defendant, The American Telephone & Telegraph Company.

(Duly Verified.)

EXHIBIT A.

"Charles Payton West, et al. No. 408792
vs. No. 15504—Law
American Telephone & Telegraph Co.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

On the 9th day of November, 1936 there was filed in this court a Mandate from the Court of Appeals, which is as follows, to-wit:

This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; on consideration whereof, the Court certifies, that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the said Court of Common Pleas is reversed for reason stated in opinion on file and final judgment is hereby rendered for appellant, no other error appearing in the record, and this cause is remanded to said Court of Common Pleas.

It is therefore considered that said appellant recover of said Appellee its costs herein.

ORDERED, that a special mandate be sent to said Court of Common Pleas, to carry this judgment into execution. The appellee excepts.

I, John J. Busher, Clerk of our said Court of Appeals, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said court.

Witness, my hand and the seal of said Court, at Cleveland, this 9th day of November, A. D. 1936.

JOHN J. BUSHER, *Clerk,*
(Seal) By EDWARD T. MURRAY, *Deputy.*

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, CUYAHOGA COUNTY.

To the Honorable Court of Common Pleas in and for the County of Cuyahoga, Greeting:

You are Hereby Commanded, that, without delay, you cause the foregoing judgment of our said Court of Appeals to be carried into complete execution.

Witness, John J. Busher, Clerk of our said Court of Appeals, and the seal thereof, at Cleveland, this 9th day of November, A. D. 1936.

JOHN J. BUSHER, *Clerk,*
(Seal) By EDWARD T. MURRAY, *Deputy.*"

REPLY.

(Filed December 17, 1937.)

Plaintiffs herein, for reply deny each and every averment in defendant's answer not consistent with their petition herein, or not in said petition or in this reply admitted to be true.

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,
Attorneys for Plaintiffs.

(Duly verified.)

TRANSCRIPT OF PROCEEDINGS ON TRIAL.

December 17, 1937.

(Filed October 3, 1938.)

WEST, *J.*

APPEARANCES:

For the plaintiffs: Harry L. Deibel, Esq.; and Clare M. Vrooman, Esq., of Messrs. Garfield, Cross, Daoust, Baldwin & Vrooman.

For the defendant: William L. Cockley, Esq., of Messrs. Tolles, Hogsett & Ginn.

Mr. Vrooman: Your Honor, this action is brought upon a bill of complaint of Charles Peyton West and Maurice John West, the only sons and children surviving of the late Charles P. West. The bill of complaint reveals that Charles P. West died on the 21st of March, 1926, leaving a last will and testament which was admitted to probate in Cuyahoga County probate court.

Mr. West was a resident and was domiciled in this county, and his will was made here. He lived here, I believe, all his lifetime and the will was filed in probate court in Cuyahoga County, and the estate was administered in this county.

The deceased provided in his last will and testament that his widow, Grace C. West, who was the sister of a deceased wife of the decedent, therefore not only a stepmother but an aunt of the two plaintiffs, was given a life estate during her natural lifetime in all his property and that it was to be divided equally, to be divided share and share alike between the two plaintiffs. And the will named Grace C. West as executrix. She was duly appointed and qualified, and some time, I believe about February, 1927, came in with an application to distribute in kind. As I recall it, the estate contained items which were appraised at some thirty six thousand dollars. I have the probate court records here and will introduce them in due course. Among the assets of the estate were certificates for 92 shares of the stock of the American Telephone & Telegraph Company, in the name of Charles P. West, the deceased. The application for a distribution in kind was approved by the court. It was consented to at the bottom, that is, there was a form, at least, which will be introduced, which was signed by the two plaintiffs.

Now, when the stock was actually transferred, instead of being transferred to Grace C. West with any limitation whatsoever, it was transferred to Grace C. West individually, that is, without limitation, although at the time

she presented the stock for transfer she also presented a copy of the will and a copy of the order for distribution, which is admitted by the defendant.

This matter was brought out in the state court, and the result was a judgment for the plaintiffs for some twenty-one thousand dollars, with interest from November 4, 1929, at which time Grace C. West turned this stock over, indorsed it over to Paine, Webber & Company, and it was transferred at their New York office between November 2 and November 4—I believe the date in the stipulation is November 4, 1929—to Paine, Webber & Company. The plaintiffs learned of this transfer in March, 1934, at the very end of March of that year an inquiry was made;—I believe the letter advising that Grace West had no stock in the A. T. & T. Co. came in the first few days in April, but I think Mr. Maurice J. West wrote, having been advised something might have happened, he immediately wrote and received word that she held no stock in the A. T. & T., and the action was filed the following June, with the result that I have stated.

The common pleas court case was tried before Judge Skeel and resulted in a judgment and the court of appeals reversed that, we say, on the ground that no demand was made prior to the filing of the suit. We have set up the filing of a demand in accordance with that opinion of the court of appeals. The opinion was a published opinion and we have it here and we now say that because the demand has been made and because the court of appeals found that a wrong had been done, we are now entitled to the value of the stock, the defendant having refused to deliver the 92 shares of stock back to the plaintiffs.

And the theory upon which this is based is that there has been an acceleration in the life of the stepmother, Grace C. West. In other words, the remaindermen are now entitled to the estate because this defendant, by its wrongful act, permitted the transfer, although it had notice of the last will and testament, the terms thereof, and knew that the stock belonged to Grace C. West only as life tenant of Charles P. West, deceased, under his will,—nevertheless permitted the transfer of the stock and the final transfer to her individually, and the final transfer from Grace C. West as an individual on November 4, 1929.

The Court: Is Grace C. West still living?

Mr. Vrooman: Still living, your Honor. She is not a party to this action. I believe she is living in Boston at this time.

I have this one further point: Grace C. West lived here in Cleveland at the time of the decedent's death. She

later lived in Boston, and the stock was turned over to Paine, Webber & Company while she resided in Boston, that is, in November 1929, and the conversion of which we complain, we say occurred in Massachusetts, that is in Boston, at that time. We believe that we have rights here based upon the wrong which has been done upon the conversion, and we come into equity to have those rights determined by this court.

Mr. Deibel has called my attention to the fact that Mrs. Grace C. West actually parted with the stock, turned it over to Paine, Webber & Company, on the 31st of October, 1929. It will appear that the certificate, if there is testimony on that point, for some reason, was shipped to the Cleveland office by mistake. The stipulation may be silent on that particular point; but arrived at New York, on the 2nd of November, 1929 and was actually transferred from Grace C. West to Paine, Webber & Company on the 4th of November, 1929.

We believe that the wrong here was in permitting Grace C. West, after the defendant had given her the right to transfer originally or had put it in her name, we believe the defendant had a heavier duty imposed upon it by that fact, because it knew the relationship which she bore to this estate and that therefore, by permitting first the transfer to her, and then with knowledge of that, by permitting the transfer from her to anybody else, the wrong was done for which the defendant is answerable to these plaintiffs.

The Court: Mr. Cockley.

Mr. Cockley: May it please the court, we have set up in our answer here four, I think, separate defenses, and I think none of them will involve very much dispute as to the facts.

First we set up the separate defenses both of the statute of limitations of four years, and laches and estoppel by reason of the failure of these plaintiffs to make any inquiry of any kind between 1927 and the time they filed this suit in 1937. They allege, to get rid of the statute of limitations, they were without knowledge of the transfer by the A. T. & T. Co. into Grace West's individual name, and by Grace C. West subsequently to Paine, Webber & Company. But that is the most they allege, mere want of knowledge, and there will be some evidence upon that point, which will necessarily be in the matter of cross examination of plaintiffs as to what they did.

The second defense set up here is that this matter has been adjudicated and a final judgment has been rendered in favor of this Telephone Company and against these plaintiffs.

As Mr. Vrooman stated to you, this case was tried on the merits in the court of common pleas. All the evidence that will be introduced here, virtually all of it, was introduced there, and the court found for the plaintiffs, the common pleas did, and rendered a judgment against the defendant for some twenty nine thousand dollars, being the full money value of the stock, of all the stock, disregarding the life estate in Grace C. West, as of November, 1929, plus interest.

We prosecuted error to the court of appeals, and the court of appeals, by its final judgment in that case, reversed the court of common pleas and entered judgment for the defendant and against the plaintiffs. It said:

"For reasons stated in this opinion on file."

No opinion was filed, but the court did furnish the opinion to counsel, and it is argued on the other side that that opinion indicates what the court really intended but that was not what it did hold, but that because of failure to make a demand the action was prematurely brought and that the court should have remanded the case to the court of common pleas with instructions to dismiss without prejudice.

But the judgment in this case is a judgment for the defendant in the ordinary form and purports to be on the merits.

Subsequently the plaintiffs prosecuted error complaining of that judgment. I should say prosecuted error and motion to certify in the Supreme Court of Ohio. It was argued on both sides on the merits, not upon the question of whether or not a demand was properly made, and the Supreme Court refused to review the judgment, denied the motion to certify. We shall claim to your Honor that that judgment was a complete bar. Perhaps it might have been raised by motion, if the plaintiffs in this case had in their reply admitted the allegations of the answer in that respect, although they will stipulate so that it will be before the court when it comes to it.

The Court: I find no reply in the papers.

Mr. Vrooman: Your Honor, the reply is here. It has not been filed. I would like leave of court to file it at this time.

The Court: Any objection?

Mr. Cockley: No; I have no objection.

The Court: It will be received and filed.

Mr. Cockley: I might call your attention at this time to the language of the journal entry or the mandate of the court of appeals which was spread on the common pleas docket, and attached as Exhibit A to our answer, and it says:

"And the judgment of the said court of common pleas is reversed for reason stated in opinion on file and final judgment is hereby rendered for appellant, no other error appearing in the record, and this cause is remanded to said court of common pleas. It is therefore considered that said appellant recover of said appellee its costs herein."

We were of course the appellant and they were the appellees.

Now, the third defense is, I suppose we may say, a general denial for admittance of evidence, denying that there was ever any cause of action in this case. And it is our claim that by reason of certain proceedings that occurred in the probate court, these plaintiffs not only knew of, but consented to the transfer of this stock to the name of Grace C. West.

Grace C. West, in January, 1927, as executrix, made an application to the probate court of this county in which she set forth the securities in the estate, including the stock of the American Telephone & Telegraph Co., reciting that by the terms of the will she was given a life estate only, but in her prayer says: "Your applicant therefore asks the court to transfer said stocks to her the within named Grace C. West," and she signed it, and there was a consent to that, "We, the undersigned Charles P. West and Maurice J. West,"—that is the plaintiffs,—"hereby consent to the foregoing distribution in kind," signed by them. And we say that is a consent to do precisely what was afterwards done, viz., transfer the stock into the name of Grace C. West, without limitation.

The order of the probate court made pursuant to that application, directed, after reciting the application, the payment of debts, the terms of the will, that she had a life estate, ordered that the stock be distributed to Grace C. West, the widow of Charles P. West and the distributee entitled thereto, without any limitation of her right of any kind. And upon being furnished—the American Telephone & Telegraph Company in New York, where it has its transfer office,—upon being furnished the copy, certified copy, of the will of Charles P. West, of Grace C. West's appointment as executrix, and this application with the consent of the two plaintiffs signed to it, and with the order of the probate court, felt justified in issuing the new 92 shares of stock, a new certificate for 92 shares of stock, in the name of Grace C. West, without limitation. Of course that made it possible for Grace C. West there-

after, under the Uniform Stock Transfer Act of New York, Massachusetts, Ohio, and every other state where they have them, to transfer the title of that stock by mere indorsement and delivery of that certificate, and that is what she subsequently did, through Paine, Webber & Company, in accordance with the testimony.

We shall argue to your Honor that these consents constituted a consent to the distribution and to the transfer of the stock precisely as it was made.

I have already referred to the statute of limitations and to laches, and those, if your Honor please, are our defenses.

Let me say one word on behalf of Mr. Vrooman and myself. We have arranged the record largely by stipulation; perhaps some examination of one witness. We had thought in the first instance to stipulate the record as it was in the Common Pleas Court, and then the problem arose, that if we did that, whether your Honor would be charged with the same rulings on review which the lower court had made in that case; and with the admissions, and so on, in the testimony, it seemed to us to create a rather impossible record, to do that, and rather than try to read that, and parts of it, we shall simply put on the principal witness and have him examined both on direct and redirect, and make up a new record.

Mr. Vrooman: Just by way of clarification so that the Court may understand the contentions of counsel in advance, in its opinion, the Court of Appeals said:

> "As we have heretofore stated, these appellees are entitled to some relief against this corporation. In our judgment they are entitled to demand of the company the return of these certificates of stock, or of other stock of equal par value, the same to be issued in such a manner as will protect the interests of all parties concerned, and will insure to these appellees the possession of the certificates and dividends thereon from and after the death of the life tenant.
>
> "They are entitled further, in the event of refusal or inability to comply with this demand, to maintain an action for damages for such refusal or failure. Until they have made such demand they have not, in our judgment, any cause of action against this corporation."

That, I think, your Honor, will clearly indicate the position of the Court of Appeals on this matter. As we have pleaded, we expect to show that demand was made

on the 10th of June, 1937 in accordance with that opinion. The opinion appears in the Ohio Bar Association Report of April 12, and I will pass it up to the Court.

Mr. Cockley: I shall object to its materiality as evidence in this case when it is offered.

The Court: You may go forward.

Mr. Cockley: Perhaps I should say one thing, and that is this: that when this case is in, I don't know yet quite the theory upon which the plaintiffs are basing this action; but if it appears that they are alleging a cause of action arose under the laws of New York or Massachusetts of a particular kind we hadn't contemplated, why, it may be I will want to amend my answer to allege the statutes of limitations of those states, under a statute which we have in Ohio, as your Honor knows; if there is a shorter period of limitations prevailing in the state where the cause of action arose, that shorter statute will control rather than the Ohio statute.

The Court: This Court is theoretically bound to take notice of the existence, of the fact, of the statutes of limitations in other states. I am just saying that.

Mr. Cockley: If that is true, then there is no demand necessary to file any further answer.

Mr. Vrooman: I wasn't aware of that.

The Court: It might be well enough for you, Mr. Cockley, if you need to amend your answer, to set up the four year statute.

Mr. Cockley: I have set up the four year statute.

The Court: Why don't you amend the answer by saying you, in effect, rely on the four year statute of limitation in Ohio and any other statutes of limitation.

Mr. Cockley: Any other statutes of limitation of other states that may be applicable.

The Court: Because the court is bound to take judicial notice of them.

Mr. Cockley: May it be understood that that language may be inserted in my answer, and I may insert it by proper interlineation?

Mr. Vrooman: Yes.

The Court: I suggest that as a short way.

Mr. Vrooman: For the benefit of your Honor I wish to refer to a case which your Honor decided on this matter of the power of the probate court with respect to order of distribution in the case of *Brown v. Routzahn,* 58 F. (2d) 329, in which your Honor said:

> "In Ohio the power of the Probate Court is exhausted in making the order of distribution, and the

court has no authority to determine the persons who will receive the assets or the amount to be paid to each,''

with notation of Ohio cases. That is at page 332.

Your Honor, we have a stipulation which we wish at this time to introduce, containing seven parts. The seventh sets forth the prices of stock on certain dates. We have two more items to be added to that, which we are getting together, but with that exception the stipulation and the exhibits set forth the essential dates and the matters relative to transfer, I believe. That will be Plaintiffs' Exhibit 1.

PLAINTIFFS' WITNESSES.

Thereupon, to maintain the issues on their part, MAURICE J. WEST, one of the plaintiffs, offered himself as a witness, and being first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Vrooman.

Q. State your name, please. A. Maurice John West.

Q. Where do you reside? A. 1473 Victoria Avenue, Lakewood, Ohio.

Q. What is your profession? A. Lawyer.

Q. How long have you been an attorney? A. Ten years.

Q. Were you born in Cleveland? A. Yes, West Park, Ohio, now a part of Cleveland.

Q. Your father was Charles P. West, Sr.? A. Yes.

Q. When did Mr. West, Sr. die? A. March 21, 1926.

Q. He left a last will and testament, a copy of which has been attached to this stipulation over here? A. Yes, he did.

Q. You are one of the sons remaining? A. That is right.

Q. One of the plaintiffs here? A. Yes.

Q. Were there any other children surviving your father? A. No, my brother is all.

Q. And your brother is Charles Peyton West? A. That is right.

Q. Mr. West, I believe your own mother died prior to your father's death. A. In 1914.

Q. Grace C. West will be referred to in this action, who is she? A. She is my mother's sister, my third cousin.

Q. When was she and your father married? A. In 1919.

Q. After that where did your father and his wife, Grace C. West, live? A. They lived in Cleveland Heights, on Berkshire Road.

Q. Did you live at the family home there, during those years? A. Yes.

Q. Your father died in 1926, is that correct? A. Right.

Q. Do you remember the date? A. I think I have already testified, March 21, 1926.

Q. Under the will, Grace C. West was named the executrix, and did she serve as executrix of that last will and testament? A. Yes.

Q. Are you familiar with the fact that some time in 1929, towit October 31, 1929, she assigned 92 shares of A. T. & T. stocks, American Telephone and Telegraph Company stock, to Paine-Webber & Company? A. I have learned that through you and through accounts I have investigated myself.

Q. When did you first learn of that? A. I received a letter from the American Telephone and Telegraph Company in the spring of 1934, I think it was April 2, in answer to my inquiry. My brother previously received a letter from my uncle in Boston informing him there was a possibility of this happening, and I got word of that.

Q. Had you ever had any other information prior to that? A. Nothing definite.

Q. Do you know the circumstances under which Grace C. West made that transfer to Paine-Webber & Company, why she did it? A. Why, I understood that she—no, I don't know the circumstances.

Mr. Cockley: Wait a minute, I object to that.
The Court: He says he doesn't know.
The Witness: I don't know the ci. umstances.

Q. Was she a woman that had business experience prior to that time? A. Yes.

Q. What business experience, if you recall? A. She was connected with W. H. Miner of Chicago, Illinois; she had charge of their billing department. She had been quite successful; built a couple of apartments in Chicago and made considerable money.

Q. How long did you continue to live in this same residence, same home, with Grace C. West, your stepmother? A. The house was sold in February, I believe, 1927. We then moved to an apartment on South Woodland Road.

My stepmother went to Boston to live in 1928, the fall of 1928.

Q. After your father died, of whom did the family consist? A. My brother and my stepmother were here, and her sister was here, and myself.

Q. What was her sister's name? A. Helen C. Spittler.

Q. Where does she reside now? A. In Boston. Her home has always been in Boston.

Q. When did Grace C. West leave Cleveland? A. In September, 1928.

Q. Now, I want to ask you whether if at any time you agreed to the transfer of that stock by Grace C. West to Paine-Webber & Company or anyone else? A. No, I did not.

Q. Did you know that that stock was transferred to Grace C. West, as an individual, without limitation? A. I did not.

Q. At any time? A. I have never seen stock certificates; I did not know.

Mr. Deibel: You may have the witness.

Cross Examination by Mr. Cockley.

Q. Mr. West, when were you born? A. April 22, 1898.

Q. Do you know the birth date of Grace C. West? A. No, I do not.

Q. Do you know her age? A. Approximately.

Q. What is her age? A. At the present time I think she is about 66, and I think her birthday is April 19, though I am not sure.

Q. But you don't know what year? A. No, within a year or two, I don't know the exact date.

Q. Now, you had known her for some time before your father married her in 1919? A. Yes.

Q. As you have said, she is a woman of some successful business experience? A. Yes.

Q. Had she accumulated some estate of her own when she married your father? A. Yes.

Q. And did you from time to time after your father's death and before, consult with her about business matters? A. Oh, we discussed things, all our family affairs.

Q. You had confidence in her judgment, did you, and advice about those things? A. Yes, I listened to it.

Q. Did you know that she occasionally bought and sold securities, before her marriage? A. Yes, she speculated.

Q. She speculated some in the market? A. Yes, all of her life.

Q. And she has been successful at it, up to 1929, or thereabouts? A. She told me she had.

Q. You told me she is living at the present time, I understood you to say, where? A. In Massachusetts, Brookline.

Q. Brookline, Massachusetts? Now, you were admitted to the bar in 1927? A. August 2, 1927.

Q. Then, for about three or four years prior to that you were a student of law in Cleveland? A. Yes, I studied law in Cleveland.

Q. After the death of your father, 1926, you continued to live in the same home with Grace C. West, until September of 1928? A. That is right.

Q. That was for about two years and a half after your father's death, wasn't it? A. Yes.

Q. Now, did this Grace C. West have any attorney representing her or representing the estate? A. No.

Q. There was no attorney? A. No.

Q. Advised her about legal matters in connection with the estate? A. No, she would ask Probate Court clerks, I understand; I don't know.

Q. How is that? A. I say, I think she would ask the Probate Court clerks.

Q. Well, do you know? A. No, not of my own knowledge.

Q. Do you say that during that time she did not consult you in connection with this estate? A. Nothing. She might ask me something but she didn't take anything—that is, she would do what she wanted. Something she didn't understand, she might ask me, and then she did it herself.

Q. You were familiar with the nature of this estate, weren't you, the amount of property in it? A. Yes.

Q. The inventory of the estate showed stocks other than the American Telephone and Telegraph Company stocks? A. Yes.

Q. What other stocks? A. Well, there was some Cleveland Railway Company, M. A. Hanna Company, Ohio Public Service, Butler Brothers, I think there was some Superior Brick that was worthless; that is all I can recall off hand.

Q. Those stocks were listed in the inventory and appraisal at about $25,000? A. Yes.

Q. And in addition to that, what was in the estate? A. My father had some land contracts, things of that kind, and some houses.

Q. The value of those was appraised at about $15,000? A. Whatever the records show.

Q. Then there was $1100 in cash? A. The records show it.

Q. Included in that inventory. Now, in January 1927, you were living at that time with your stepmother? A. Yes, sir.

Q. In the same house? A. Yes.

Q. Mrs. Spittler was also living there, was she not? A. I think she was.

Q. Mr. West, I call your attention to an application for distribution filed in the estate of Charles P. West, of the Probate Court, which is Exhibit 11, attached to Plaintiffs' Exhibit 1. You are familiar with that application, are you not? A. Yes, I am.

Q. You have seen the original of it? A. Yes.

Q. And was the signature attached to the consent on that application, Maurice J. West, your signature? A. Yes.

Q. Do you remember signing it? A. Yes.

Q. Did you read it before you signed it? A. Yes.

Q. And I think you had seen the original signature of your brother, Charles P. West, Jr., that is attached to that? A. Yes.

Q. You had seen it before, the original? A. Yes.

Q. Are you able to say whether that is his signature or not? A. Yes, that is his signature.

Q. You were together when you signed it, do you recall? A. I think we were, on Berkshire Road.

Q. That application for distribution included not only the stock of the American Telephone and Telegraph Company, but all the stocks in the estate, didn't it? A. Yes. It included all, so I understood.

Q. Now, do you say to this Court that you did not know that under that application these stocks would be distributed to Grace C. West?

Mr. Vrooman: I object, your Honor.

The Court: Overruled.

Mr. Vrooman: Objection.

A. No, of course not. I knew they would be transferred to her, but only transferred to her for her natural life. I didn't know they would be transferred to her without limitation.

Q. You knew they would be transferred to her, didn't you, in some form? A. Why, sure.

Q. But your statement is you didn't know they would be transferred to her without limitation, is that it? A. Right.

Q. Do you now know as of what date Grace C. West sent in the necessary papers to the American Telephone and Telegraph Company to have those 92 shares transferred into her name? A. The record shows January 14th, I think, 1927.

Q. Well, I ask you if you knew of your own knowledge when she sent them in? A. Yes, I remember approximately the date, and I know now that is the date.

Q. That is the same date this order was entered? A. I don't know when she mailed it to A. T. & T.

Q. That is what I'm asking you. A. I remember the time of the discussion; when she mailed it to them, I don't know.

Q. The new certificate was issued on February 2nd, by A. T. & T.? A. Yes.

Q. Do you know whether it was three or four days or a week prior to that the papers were sent to them? A. No. We signed it, turned it over to her and she went ahead with it.

Q. Did she show you the paper she sent to the American Telegraph & Telephone Company? A. No.

Q. Did she ask you anything about it? A. At the time we signed the application we understood it was going to be transferred, and that was all there was to it.

Q. Now I want to have marked for identification, Defendant's Exhibit A. There was 52 shares of Cleveland Railway Common stock in your father's estate, wasn't there? A. That is right.

Q. I hand you Defendant's Exhibit A and show you attached to the back of it an irrevocable stock power and call your attention to the signature, M. J. West.

Mr. Vrooman: I object, your Honor. This is immaterial, what was done in connection with the Cleveland Railway Company's stock.

The Court: Well, the Court will hear the testimony.

A. I don't know.

Q. You don't know whether that is your signature or not? A. No.

Q. Well, will you tell the Court whether you do identify that as your signature or refuse to identify it as your signature? A. It looks exactly like my signature. I have no recollection of signing it.

Q. Well, how much like your signature.

The Court: He says exactly. I don't see how you could make it any plainer than that.

Q. Will you now admit it is your signature? A. No.

Q. Well, if I were to present you your signature as attached to the application for probate which you have just admitted was yours, could you point out any difference between that signature and this one? A. No, I can say that signature of Helen C. Spittler isn't her signature.

Q. Helen C. Spittler is a witness? A. Yes.

Q. I am asking you about your signature. A. Well, I say, I have no recollection of signing it.

Q. You say you never did sign it? A. I don't know; maybe I did.

Q. Now, that irrevocable power of attorney that you signed, authorized the transfer of 52 shares of the stock of the Cleveland Railway Company to Grace C. West, doesn't it?

Mr. Vrooman: I object, and the reason I object is because Mr. Cockley has characterized the legal effect of the instrument which he is describing.

Mr. Cockley: Oh, well, it is a simple document, I want to see what he knows about it.

The Court: I think some objection might be made due to the fact that you embody in your question that the witness did sign that document, and he has so far declined to say that he did sign it. If you will omit that characterization of his signature, I will listen to the testimony.

Mr. Cockley: Well we strike that out, then.

The Court: Just withdraw that question.

Mr. Cockley: Yes, withdraw that question.

Q. This irrevocable stock power purports to authorize Grace C. West to transfer 52 shares of stock of the Cleveland Railway Company to her name, does it not? A. It is not an irrevocable stock power. I don't know what it is; it is none such.

Mr. Vrooman: I object.

The Court: It shows what it purports to be on its face, Mr. Cockley, the Court doesn't need any advice on that subject from the witness or anybody else.

Mr. Cockley: I presume not.

Q. Calling your attention to the signature of Charles P. West, Jr., on that Defendant's Exhibit A, I will ask you if that is his signature. A. Looks exactly like his signature. The "H" is a little off, but I would say it looks exactly like his signature. I have no recollection of seeing him sign it.

Q. You say you didn't see him sign it?

The Court: He says he has no recollection of seeing his brother sign it.

Mr. Vrooman: I object. I must inquire of counsel what the purpose of the examination of this Cleveland Railway transfer is.

Mr. Cockley: Well, be patient.

Q. Now, this paper, Defendant's Exhibit A, and the power attached to it is dated January 31, 1927, is it not? A. Yes.

Q. Do you say to the Court that you did not, you have no recollection at all, of signing that paper? A. Yes.

Q. On or about January 27th? A. Yes.

Mr. Vrooman: Your Honor, what does this question mean; you have or have no recollection?

Mr. Cockley: I said, "you have no recollection of signing it."

Q. You have no recollection of ever discussing the matter with your stepmother, on or about January 31, 1927? A. I have a faint recollection of that thing coming out to the house and my refusal to sign it, but I don't know.

Q. Are you saying that the name M. J. West, here, is a forgery on this paper? A. I really don't know. I may have signed it, and I may not. The signature of Helen C. Spittler does not compare at all with other signatures I have seen of hers, and that makes it questionable in my mind. I am saying frankly and truthfully, I have no recollection of signing it. All I can say is I don't know. I don't know what else I can say.

Q. Is it a fact you say the signature of the witness Helen C. Spittler is not her signature? A. It doesn't look like anything like it.

Q. Which suggests to you it is not your signature. A. It might have been copied.

Q. Is that the thing which calls it to your attention? A. No, I have no recollection of signing it, and certainly when I have no recollection—

Mr. Cockley: It seems to me I have the right to ask the witness for a yes or no answer, whether this is his signature.

The Court: You have the right to ask him. You can ask him again. You have already asked him once or twice.

Mr. Cockley: I know I have asked it; I am not clear he is answering whether that is or is not his signature. He says it looks identical with it.

Q. Are you prepared now to say whether it is your signature or it is not your signature? A. I am prepared to say I don't know.

Q. You would not say it is, or you won't say it is not? Is that right? A. That is right.

Q. You cannot point out any difference between that signature and your other signature which I showed you, which you admit, that is true, is it not? A. Yes.

Q. Now, I would like to have marked for identification as Defendant's Exhibit B this paper, certificate of stock of the M. A. Hanna Company, preferred stock in the M. A. Hanna Company. Mr. West, I want to show you what purports to be a signature "M. J. West" on the back of that under date of January 31st, 1927, and ask you if you can identify that signature as your signature. A. It looks exactly like my signature.

Q. Would your answers as to this signature be precisely the same as to the signature I showed you on Defendant's Exhibit A? A. Not exactly. All I can say as to that, I have no recollection of signing it. There is no question about the document. I don't know any reason why I would not have signed it, perhaps, but the other one is questionable. I have no recollection of signing it.

Q. Is it, or is it not, your signature? A. My dear man, I cannot tell you.

Q. You won't say it is and you won't say it is not. A. That is right.

Q. What about the signature of your brother, Charles P. West, Jr., on that? A. It looks exactly like his signature, but I have no recollection of seeing him sign it.

Q. What about the signature of Helen C. Spittler, as a witness? A. May I see that?

Q. Certainly. A. (After examining same) That looks more like her signature. I wouldn't question that signature.

Q. But you have no recollection at all of signing it? A. No.

Mr. Cockley: I ask that certificate of stock in the M. A. Hanna Company, preferred stock No. C04491 be marked as Defendant's Exhibit C. (So marked.)

Q. Mr. West, did you ever see that stock certificate before, of which that is a copy, photostatic copy? A. No, I never saw this.

Q. Turn it over and look at the back of it. A. I see the back of it, you ask me to turn it over and look at the back of it.

Q. I asked you if you ever saw it before, or had it in your possession? A. Not that I know of.

Q. It purports to assign 16 shares of Cleveland Railway stock to M. J. West and 16 shares to Charles P. West, signed by Grace C. West. Didn't she deliver this to you? A. No, she brought the 16 share certificates.

Q. She had them transferred to your name and gave you each the 16 share certificates? A. That is right.

Q. About when did that occur? A. About the time she went away, September, 1928.

Q. Was it a gift of Mrs. West to you and your brother? A. I wouldn't call it a gift, the stock wasn't paying any dividends. She said it was no use to her. She suggested she would turn it over to us, and we said okeh.

Q. Did you pay her anything for it? A. No.

Q. It was a gift? A. I don't know. My brother and I always thought the stock belonged to us. Maybe I am wrong.

The Court: What stock was this?

Mr. Cockley: This was the 32 shares of preferred stock in the M. A. Hanna Company.

The Court: I thought it was Cleveland Railway stock you were referring to. Be sure it gets into the record under its proper designation, that is all.

Mr. Cockley: Defendant's Exhibits B and C are both stock of the Hanna Company and Defendant's Exhibit A are the certificates relating to the Cleveland Railway stock.

Q. Well, you knew at least, Mr. West, when that stock was delivered to you, that your stepmother must have had it in her name in order to make the delivery. A. Really it did occur to me at the time, it seemed strange. Then I thought as long as she delivered it to us and transferred it to us, there was nothing to it.

Q. You didn't think about it? A. It passed through my mind a little bit, whether she could do that, yes, but when she transferred it to the two of us, I thought it would be all right.

Q. When that passed through your mind what inquiry did you make of her about the American Telephone and Telegraph stock? A. I didn't make any inquiry about anything; just put it in my mind.

Q. You lived with your mother, as you testified between February 2, 1927, when the A. T. & T. stock was transferred into her name, until September, 1928, continuously, you lived in the same house? A. Yes.

Q. Now, during all that time, what inquiry did you make from her about the A. T. & T. stock, in whose name it stood, or whether she still had it? A. Why, she told us she transferred it. At the time that transfer was made I stressed the point she should transfer it in some way it would be earmarked, although I supposed she did; she didn't say anything about it.

Q. You didn't testify about that discussion in the trial in the Common Pleas Court. A. I think there was some discussion.

Q. What inquiry did you make of her as to whether that stock was transferred to her outright or to her for life? A. I didn't make any.

Q. Did you ask to see the certificates? A. I did not.

Q. Did you ever hear about the certificates of the American Telephone & Telegraph stock, from 1927 to 1934? A. Yes.

Q. When? A. In 1930.

Q. Tell us about it, where were you? A. I was married and went on my honeymoon, went down to Boston. After I was there a while, my sister-in-law, or rather my aunt, Helen Spittler, mentioned to me about that Grace had suffered great losses in the stock market, and she thought some of our securities were gone, and so while I was there I asked Grace about it and I demanded to see the certificates and she refused to show them to me.

Q. What did you do about it after she refused to show them to you? A. I was a guest in her home, I didn't say anything more about it, until shortly after I left, I investigated.

Q. In 1930 you investigated? A. Yes.

Q. Did you write the American Telephone & Telegraph Company a letter at that time? A. No, I went to the Cleveland Electric Illuminating Company.

Q. You didn't go there to investigate the transfer of A. T. & T. stock? A. I went there to investigate the standing of the estate. How did I know anything about the securities?

Q. Just answer the question. You didn't go there to examine the title to the stock of the American Telephone & Telegraph Company? A. Certainly not.

Q. In March of 1934, you did write a letter to the American Telephone & Telegraph Company and they wrote you promptly telling you the stock had been transferred out of her name in November, 1929, didn't they? A. That is right.

Q. I ask this letter be marked Defendant's Exhibit D. I hand you what has been marked Defendant's Exhibit D,

and ask you if that is the letter you received from the assistant treasurer of the American Telephone & Telegraph Company in 1934? A. Yes.

Q. But in 1930, when you learned at Boston that Grace C. West had suffered some losses in the market, you didn't write a letter to the American Telephone & Telegraph Company, did you? A. After my inquiry at the Cleveland Electric Illuminating Company, it wasn't necessary; I thought.

Mr. Cockley: I ask that be stricken out and the answer be confined to the question.

The Court: Motion overruled.

Q. Now, will you answer, did you or did you not write to the American Telephone & Telegraph Company? A. No.

Q. Then you didn't go to the Cleveland Electric Illuminating Company to find out anything of the record of the A. T. & T. stock, did you? A. Yes, I went over there to find out if the securities were earmarked.

Q. You say to the Court that the Illuminating Company would know the form in which the American Telephone and Telegraph Company stock had been issued? A. If their certificates were earmarked, I would naturally think the others were—

Mr. Cockley: I think the answer is not responsive to the question.

Mr. Vrooman: I object to inquiring any further.

Q. Now, what other investigation did you make? You have told us now that between 1927 and 1930 you made no inquiry; that in 1930, on your wedding trip, you learned that your stepmother had had some losses and then you made this inquiry of the Electric Illuminating Company. I suppose that was about Electric Illuminating Company stock, wasn't it? A. Right.

Q. Now, tell us any other inquiry you made between 1930 and the date of this letter, and April 4, 1934, respecting the title to this American Telephone & Telegraph Company stock. A. I made no inquiry with respect to the title of American Telephone & Telegraph Company stock.

Q. Did you ever go down and investigate the records of the Common Pleas Court—I mean the Probate Court—in connection with this estate, between 1927 and 1934? A. Why, no, I thought everything was all right, after verifying the record at the Cleveland Electric Illuminating Company; one corporation transferred properly and I thought the others would.

Q. You are so anxious to tell us, what did you find out at the Illuminating Company? A. I found they transferred the stock to Grace C. West, life tenant of the estate of Charles P. West, deceased.

Q. The Electric Illuminating Company did that? A. Yes.

Q. Did you make any other inquiry about any other securities? A. I went over to the Cleveland Railway a couple of times, I wasn't very serious about it. I knew, I felt, rather ashamed of myself,—

Q. You went over to the Cleveland Railway Company? A. Yes.

Q. Did you make any other inquiries from anybody else? A. No, I went to the Cleveland Railway Company.

Q. Did you find in what form the Cleveland Railway Company stock was registered in the first instance? A. No. They told me to get proper papers or something. I wasn't interested nor felt it was serious enough to go any further with it. I didn't find out at that time.

Q. You have seen the order of distribution that was made after the application for distribution was filed in this case? A. Yes, I think perhaps I went down there to look at my father's estate. I don't recall, perhaps I did.

Q. When do you say you first saw that order of distribution? A. Oh, I went down there in 1930, and took a look at it.

Q. In 1930 you saw the order of distribution, at that time? A. The application, not the journal entry.

Q. Oh, you didn't see the journal entry, then? A. No.

Q. You were investigating this estate in 1930, weren't you, to find out something about these stocks? A. Yes, I went over to the Cleveland Electric Illuminating Company.

Q. Oh, just a minute. We are talking about the Probate Court. You went down to investigate what the Probate Court records showed about the stock. You now say you saw the application for distribution, but didn't look at the order of distribution? A. I went down there and looked at the file and took a look at the application.

Q. You didn't look at the order for distribution? A. No, the order was in a different book.

Q. When did you first see it? A. I didn't see that order until the spring of 1934, April of 1934, is the first time I saw that journal entry.

Q. You had nothing to do with preparing the application or the order of distribution? A. No, I did not.

Q. Now, there was certain money due on land contracts and other monies in the estate? A. Yes.

Q. Those were all turned over to your mother or to Grace C. West? A. Yes.

Q. She was acting as administrator or executor without bond? A. Yes.

Q. Neither you nor your brother ever made application to require her to put up bond?

Mr. Vrooman: I object. There is no provision in Ohio Law for that proceeding.

The Court: The pleadings clearly make that question competent.

Mr. Vrooman: I ask an exception.

Q. What was the answer? A. No.

Q. You never made any application? A. No.

Q. Never asked to have a trustee for these securities at any time?

Mr. Vrooman: I object.

The Court: Same ruling.

Mr. Vrooman: Exception.

A. No reason for it.

Q. Well, you didn't make any such application?

The Court: The Court will of course take that answer as being a negative reply.

Q. What induced you to make inquiry of the American Telephone & Telegraph Company in 1934, pursuant to which you got the letter marked Defendant's Exhibit D?

Mr. Vrooman: I think that has been covered, your Honor.

Mr. Cockley: The one in 1930 has, not in 1934.

A. I had been visiting my brother in Pittsburgh. He received a letter from my uncle, William Spittler, which he showed to me, to the effect Grace had lost considerable securities and that she was down in Florida, and that our stuff was gone. That was practically positive information.

Q. Then, when you heard of that, you wrote this letter and got this letter telling you the situation as to the A. T. & T. stock? A. I had found out first the Cleveland Railway Company stock and the Ohio Public Service was gone; of course I was going through it thoroughly. I then looked for the A. T. & T.

Q. Then you went to Brookline, Massachusetts, in 1934, to see your stepmother? A. Yes.

Q. What was the purpose of that visit? A. I didn't know where my stepmother was. I went to Brookline to find out where my stepmother was. My purpose was to

show her these facts and demand a return of the assets of the estate.

Q. You found she was in Florida, working? A. Yes.

Q. So you went to Florida? A. Yes.

Q. At your request or solicitation, at least, she then turned over to you some securities, didn't she, for you and your brother? A. She turned them over to us, both of us.

Q. What securities did she turn over to you and your brother? A. She turned over Cleveland Electric Illuminating Company, Ohio Public Service and I got Butler Brothers, in Brookline, Mass.

Q. Butler Brothers? A. That was in Brookline.

Q. That is there was 25 shares of stock of Cleveland Electric Illuminating, was it? A. Yes.

Q. 25 shares of Ohio Public Service Company, preferred, that was turned over to you? A. Yes.

Q. And 15 shares of Butler Brothers, is that right? A. Yes.

Q. How about the Superior Brick Company, preferred and common? A. Oh, I had that before; it was worthless.

Q. Did she turn it over to you at that time? A. Yes.

Q. Does she get the income, since that date, of any of that stock? A. No.

Q. Has been turned over to your brother, has it, completely? A. My brother is sending her an amount of money equivalent to it.

Q. Your brother is? A. Yes, so I understand.

Q. Well, at the time you talked to her in Florida, didn't she tell you at that time that you had consented to this transfer of A. T. & T. stock made in 1927?

(Objection; overruled; exception.)

A. Yes, she said I had consented.

Mr. Cockley: That is all.

Mr. Vrooman: We wish at this time to read into the record the testimony of Charles Peyton West, one of the plaintiffs here, who is unable to attend the trial. It has been stipulated by and between counsel that his testimony in the last trial of this case in the common pleas court of this county may be read as though it were a deposition. We may find we will have to change some exhibit numbers as we go along, in doing that. Mr. Deibel, will you proceed?

(Deposition read by Mr. Deibel as follows):

CHARLES PEYTON WEST, JR., having been first duly sworn, testified as follows:

Q. State your name, please? A. Charles Peyton West, Jr.

Q. Where do you reside? A. 647 Newport Road, Forest Hills, in Pennsylvania.

Q. That is a suburb of Pittsburgh, is it? A. A suburb of Pittsburgh.

Q. By whom are you employed? A. The Westinghouse Electric & Manufacturing Company.

Q. You have been so employed how long? A. For approximately nine years.

Q. I believe you heard your brother testify that within a month or six weeks after your father's death you went to the Westinghouse Company; is that correct? A. I started there the first of May following his death.

Q. After you became employed by the Westinghouse in Pittsburgh, how frequently did you return to Cleveland? A. Through the good weather in the summer I usually came up every other week, and in the winter probably once a month.

Q. And at that time where did you visit in Cleveland? A. At the residence of my stepmother.

Q. And that was on Berkshire Road, was it? A. And subsequently on South Woodland Road.

Q. How long did those visits continue, Mr. West? A. As long as she was in Cleveland.

Q. She left Cleveland when? In 1928? A. I think so.

Q. Now, were you familiar with the nature and extent of your father's estate? A. Yes.

Q. You were familiar with the fact, were you, that Grace C. West was the named executrix under the will and qualified under the will? A. Yes.

Q. And was the matter of distribution discussed with you at the time in January, 1927, when the distribution in kind was made to Grace C. West? A. We talked over the matter.

Q. Were you familiar with the terms of the will, Mr. West? A. I was.

Q. Were you familiar with the fact that there was in the estate 92 shares of stock of the American Telephone & Telegraph Company? A. I was.

Q. And that stock was to be distributed in kind to Grace C. West, was it? A. It was.

Q. What was your understanding with respect to the transfer of the stock to her?

Mr. Cockley: I renew that objection.
The Court: The court will hear the testimony.
Mr. Cockley: Exception.

A. (Answer not read.)

Q. Did you have any talk with Grace C. West at the time the transfer of shares was made, with respect to the manner in which the transfer should be made?

The Court: What stock? Let me get that clear, —the American Telephone & Telegraph stock?
Mr. Vrooman: The American T. & T. stock.

A. Yes.

Q. When was that? A. I cannot name a date. On some of my visits to Cleveland.

Q. Was it before the date of distribution or after it, if you can recall? A. It was probably at that time, though I have no knowledge of being at the preparing of the document.

Q. That is, you had no part in the preparation? A. No.

Q. Did you ever see the stock certificates after the stock was re-issued to Grace C. West? A. No.

Q. Did you have any information as to the manner in which it was issued at any time? A. No.

Q. When were you first informed that the stock had been disposed of? A. Why, I received a letter from my uncle, that is, Mr. Spittler, in which I was—

Mr. Cockley: I object. He has asked the time.
The Court: Can you tell when you first heard of it?

Q. Can you qualify the time? A. That was, I believe, in the fall of 1934. The letter is available.

Q. To refresh your recollection, wasn't it in the spring of 1934? A. I can't name the date definitely, but the letter is available.

Q. Do you have the letter here? A. It is there (indicating).

Q. Did you ever at any time consent to the disposal of the American Telephone & Telegraph Company stock by Grace C. West, life tenant? A. I did not.

Mr. Vrooman: You may have the witness.
Mr. Cockley: I will read it.

Cross Examination (Read by Mr. Cockley).

Q. You have lived in Pittsburgh then practically ever since your father's death, Mr. West? A. About that time.

Q. And you returned, you said, on visits bi-monthly during the summer, and probably once a month during bad weather? A. Right.

Q. Always on friendly terms with your stepmother, were you not? A. Always.

Q. I will hand you Plaintiffs' Exhibit 1, Exhibit 11 attached thereto, Mr. West, and ask you if that is your signature appearing, "Charles P. West, Jr.", at the bottom? A. It is.

Q. And where was your signature affixed to this paper? A. I don't remember.

Q. Was it sent to you at Pittsburgh? A. I cannot answer you yes or no. The probabilities were against it because I usually signed such things on my trips to Cleveland.

Q. Well then, you have no independent recollection at this time as to where you were at the time you signed this particular instrument? A. No.

Q. And did you read over the application before you signed it? A. I usually read such things before I sign them.

Q. And did you read the consent before you signed it? A. Well—

Q. The language immediately above your signature? A. Yes, I read that.

Q. Now, this signature purports to have been on the instrument, rather purports to have been executed on the 14th day of January, 1927. Do you know when your signature was affixed to it with reference to that date? A. I couldn't answer that.

Q. Did you see a proposed journal entry or order prepared which was to be signed by the court granting this application? A. I don't remember any such document.

Q. At the time you signed this paper, do you remember any other paper being submitted to you for examination? A. No.

Q. If this paper was signed in Cleveland it was probably signed at the residence of your stepmother and your brother, Maurice? A. I would say so.

Q. So, not knowing where the paper was signed, do you remember there was any discussion preceding your affixing your signature to it? A. The document was undoubtedly read; I can't quote any discussion.

Q. You have no present recollection of any, anyhow? A. That is right, at this time.

Q. Now, will you examine Defendant's Exhibit A and tell us whether you affixed your signature to that paper?

A. As far as I can see, that paper appears to be my signature, but I have no recollection of signing this document.

Q. Were you present during all the time your brother, Maurice, testified on this same subject? A. I was.

Q. Were you in any way guided or influenced in your present answer by anything he said? A. No, I am not. I may have used some of the same words, some of the words that I heard.

Q. Well, you almost gave it parrot-like. A. But the thought is independent.

Q. Do you have any doubt about that being your signature? A. I have the same doubt that he has, because this matter has been discussed previously.

Q. Please answer my question. Do you have any doubt the signature appearing on there is your signature and was put there by you? A. I have a doubt.

Q. You have a doubt it is; you cannot say to the court this is your signature? A. I wouldn't guarantee it.

Q. I don't care about your guarantee; I would like to know whether you are willing to state to the court that this is or is not your signature. A. I am not willing to state.

Q. Either way: you are not willing to state; you are not willing to swear that this is your signature, or you are not willing to swear it is not your signature; is that right? A. Yes.

Q. Now, you have admitted the signature on Plaintiffs' Exhibit 1, Exhibit 11 attached thereto. Will you make comparison between them and tell us if there is any difference between the two signatures, one of which you admit and the other which purports to be yours? A. From all appearances they are the same.

Q. After having examined the instrument which you admit as having your signature, what do you say, whether the signature on the other instrument is or is not yours? A. I repeat my previous statement.

Q. Well, what is it? A. Will the clerk please read the words?

Q. What is the answer? A. Will the clerk have it read?

Q. I would like you to answer it. A. What is the question you propound?

Q. What is your direct answer to that: what do you say as to whether, after having examined both signatures, the one you admit to be yours, whether Defendant's Exhibit A is your signature? A. I cannot say whether it is or is not my signature.

Q. Do you want to stand on that answer when you are under oath? A. I do.

Q. Now, you said you discussed this matter before. Whom did you discuss it with? A. The attorneys and my brother.

Q. Tell us whom you discussed it with.

Mr. Vrooman: Forget that objection.

A. Mr. Vrooman, Mr. Amer, my brother, and Mr. Deibel.

Q. Now, Mr. Deibel, Mr. Amer, and Mr. Vrooman didn't know anything about whether this is your signature or not? A. No.

Q. They weren't able to help you on that subject? A. No.

Q. You didn't discuss it with your brother, did you? A. Yes.

Q. Have you any doubt about the signature of Helen C. Spittler, your aunt, on that instrument? A. I have.

Q. You have some doubt about it? Was that one of the subjects of discussion between you and your brother? A. Yes.

Q. Mrs. Spittler was living with your stepmother and your brother? A. Yes.

Q. Mrs. Spittler was living with your stepmother and your brother at the time this instrument purports to have been signed, was she not? A. Why, she was during that time; she might have been away for short periods.

Q. Well, I say, she was resident there? A. She was resident there.

Q. Living there. There is not any question about that, is there? A. You are right.

Q. Well, do you remember any transaction in connection with the execution of a stock power for the Cleveland Railway Company? A. No.

Q. Do you remember any discussion on that subject at all? A. No.

Q. Never talked that over with your mother at all, your stepmother? A. No.

Q. Now, I will hand you Defendant's Exhibit B, Mr. West, and ask you to examine the signature appearing on this instrument "Charles P. West, Jr." and tell us whether that is your signature. A. I cannot say that it is or that it is not my signature.

Q. You make the same answer respecting Defendant's Exhibit B that you did to Exhibit A? A. (Witness nods.)

Q. Well, how did you identify the signature on Plaintiffs' Exhibit 1, Exhibit 11 attached thereto, then, since both signatures are identical; will you tell the court that?

A. All I can say is that it looks the way I sign my name, and I have no reason to question it.

Q. You didn't answer my question. You have identified that was your signature on Plaintiffs' Exhibit 1, Exhibit 11 attached thereto, and you say you fail to identify your signature on Defendant's Exhibits A and B. Since all those signatures are identical, will you tell us how you identify the one and cannot identify the other two? A. They appear alike. I have no memory of signing any of the documents. I have reason to question one because of the signature of the witnesses.

Q. I am going to insist on an answer. A. I will make the further statement that on the date of that document, was a normal working day in Pittsburgh; I presumably was at work there.

Q. I am going to ask you the same question over again, and I wish you would listen so we can try to get this question answered and not waste any more time. (Previous question read to witness.) You didn't answer my question. You have identified that it was your signature on Plaintiffs' Exhibit 1, Exhibit 11 attached thereto, and you have failed to identify your signature on Defendant's Exhibits A and B. Since all those signatures are identical, will you tell us how you identify the one and cannot identify the other two? A. I cannot make a statement as to that.

Q. You cannot answer the question. Mr. West, you received 16 shares of the preferred stock of the M. A. Hanna Company from your mother? A. I did.

Q. She transferred that stock in 1928? A. Approximately, yes.

Q. Were you in Pittsburgh at the time that was done? A. Yes.

Q. Were the stock certificates sent to you? A. I don't remember whether it was mailed or handed to me while visiting in Cleveland; I cannot say.

Q. Did you know your mother was going to give it to you before receiving it? A. Yes.

Q. She had discussed that with you? A. Yes.

Q. You didn't do anything about it at all? A. No.

Q. She made the transfer; you got the stock as a gift? A. As far as I remember.

Q. You knew the stock in the estate was to be distributed in kind, according to the application? A. According to what?

Q. I mean from the fact that the application was filed, you knew the stock of the estate was to be distributed in kind? A. Right.

Q. From the date of the filing of the application, which was the 14th day of January, 1927, up until 1934, did you ever make any inquiry as to how or in what manner the A. T. & T. stock was transferred? A. Between what dates?

Q. The time of the filing of the application, January 14, 1927, up until the spring of 1934, when this lawsuit was filed, did you personally ever make any inquiry about the A. T. & T. stock at all or the manner of its transfer? A. Not by name.

Q. Did you at any time prior to 1934 communicate with the American Telephone & Telegraph Company at any time with reference to this stock, the 92 shares? A. I did not.

Q. You still have that Hanna stock, have you? A. I do.

Mr. Vrooman: May I ask if counsel admits the making of demand?

Mr. Cockley: I admit the A. T. & T. received a letter. I will admit the copy of the letter, if that is what you mean by demand.

Mr. Vrooman: Yes. Your Honor, I will read into the record at this time the demand which was made June 18, 1937. This is a letter signed by Garfield, Cross, Daoust, Baldwin & Vrooman, and Mr. Deibel, as attorneys for Charles P. and Maurice J. West, the original of which was sent to the American Telephone & Telegraph Company at 750 Huron Road, Cleveland, Ohio, copy to Tolles, Hogsett & Ginn, attorneys of record for the defendant. "Gentlemen: Re Charles P. West and Maurice J. West vs. American Telephone & Telegraph Company.

"The Court of Appeals in cause No. 15,504 of the docket of the Eighth Judicial District of Ohio, determined our clients, Charles P. West and Maurice J. West, were entitled to demand of your company the return of certificates for 92 shares of stock, or of other stock of equal par value, and that until they made such demand, no cause of action arose against your company. Our clients, Charles P. West and Maurice J. West, hereby demand that you issue within ten days from the date hereof in their joint names and deliver to them a certificate for 92 shares of capital stock of the American Telephone & Telegraph Company, wrongfully transferred by you to a third party on November 2, 1929, and at the same time pay and deliver to them a sum equivalent to the aggregate cash dividends on 92 shares of said capital stock paid since

November 2, 1929, with interest at 6% on said dividends from the times of such payments; that you pay and deliver to them the difference between the value of said stock at the time of this demand and the highest intermediate market value on the date of said wrongful transfer with interest on the latter sum at 6% from the date of this demand; and you preserve on behalf of or restore unto said clients any rights, privileges or immunities of which they have been deprived by said wrongful transfer.

"Our said clients, without waiving any rights of damages or in any way limiting the extent or amount of any action, or right of action or right of recovery which they may now or hereafter have of you by reason of said wrongful transfer, further demand you restore to them whatever rights they may have heretofore have had, may now have, or may hereafter have by reason of said wrongful transfer.

"A copy of this letter is being mailed to Tolles, Hogsett & Ginn, your counsel in the above referred to action.

"Very truly yours," signed as above indicated.

Mr. Cockley: How is that signed?

Mr. Vrooman: By Garfield, Cross, Daoust, Baldwin & Vrooman, and Harold Deibel, attorneys for Charles P. West and Maurice J. West.

Mr. Cockley: Now, the defendant will concede that the original of that letter was received by the American Telephone & Telegraph Company in the ordinary course of the mails following the date on which it was sent, and that a copy was also furnished to counsel on or about the same date.

Mr. Vrooman: Mr. Cockley, is it stipulated that the dividends during the period in question, that is, from the date of the transfer until the present time, have remained at $9 per share per annum?

Mr. Cockley: Well, I think that is the fact, but I want to check. I would be glad to stipulate whatever it is, subject to correction. I think it has been that since some time in 1920.

The Court: Do you know the dividend at that time?

Mr. Cockley: I do not.

Mr. Vrooman: May we stipulate and file subsequently the amount of the dividend and the date of dividend?

Mr. Cockley: Yes, surely.

Mr. Vrooman: Now, your Honor, counsel have also agreed that counsel may, after the filing of briefs and oral argument, if the court care for it, file with the court their references to the law of Massachusetts and New York, both the statutory law and the cases which they claim to be relevant, and that the court may in its findings of fact and conclusions of law determine the fact as to the laws of those two states and its conclusions as to the laws of those states, if applicable, and whether applicable. Is that correctly stated?

Mr. Cockley: Substantially so, I think.

Mr. Vrooman: Now, I wish to offer formally as Plaintiffs' Exhibit 1, and the Law Reporter I believe should be marked Plaintiffs' Exhibit 2, which sets forth the opinion of the Court of Appeals of the Eighth Judicial District.

Mr. Cockley: I have no objection to 1. I object to 2 on the ground that you cannot modify the judgment of the court by reason of the opinion. It is signed, and the judgment is perfectly clear.

The Court: The court will receive the item of evidence over your objection.

Mr. Vrooman: I believe, Mr. Cockley, your answer admits the refusal of the demand. In case it does not, will you stipulate that the demand of June 18 or the request in the letter, was refused?

Mr. Cockley: No. I stipulate that we never answered the letter.

Mr. Vrooman: Well, you did answer it.

Mr. Cockley: Oh, did I? Well, I will stipulate in accordance with this letter we acknowledge receipt of your demand upon the American Telephone & Telegraph Company, receipt of copy of your demand upon the American Telephone & Telegraph Company, on June 21, 1937. There is no doubt about the fact that we have never paid any attention to their demand, if it was a demand.

Mr. Vrooman: One more thing and I will be through. I would like to have Mr. Maurice J. West resume the stand for a moment.

Maurice J. West thereupon resumed the stand and further testified as follows:

Direct Examination by Mr. Vrooman.

Q. Mr. West, you are familiar with Helen C. Spittler's signature, are you? A. I am.

Q. Can you identify it? A. Yes.

Q. I will ask you whether or not this series of five checks which we are about to hand you and which will be marked Plaintiffs' Exhibit 3, do in fact bear the signature of Helen C. Spittler as indorsement thereon.

The Court: The genuine signature?

A. Yes, I would say this is her signature.

Mr. Cockley: I want to object to this in its entirety; expecting to compare this signature with one on another paper, and say that it is not. It doesn't make a bit of difference whether Helen C. Spittler's signature is on the paper I introduced; the question is whether he signed it, not whether she signed it.

The Court: The court will receive the item of evidence.

Any cross examination?

Cross Examination by Mr. Cockley.

Q. May I see those a moment? Well, Helen C. Spittler's name appears twice on each of those indorsements? A. Whatever it does there. I can look at it and see.

Q. I ask you to look at that signature. Is that Helen C. Spittler's? A. No, that is Grace C. West's. She indorses: "Please pay to Helen C. Spittler."

Q. So the second signature, that is Helen C. Spittler's? A. Yes, the second signature.

Q. Did she always make her signature exactly that way, do you know; always the same way? A. That is her signature as I recall it. I don't recollect any other signature.

Mr. Cockley: That is all.

Mr. Vrooman: Plaintiffs rest.

The Court: We will take no more testimony this morning. Adjourn court until 1:30.

(At 1:30 p.m. the trial was resumed.)

The Court: You may proceed, Mr. Cockley, with the defense.

Mr. Cockley: I would like to stipulate first, that Charles P. West, Jr., was born July 10, 1896. Is that agreeable to you?

Mr. Vrooman: Yes.

Mr. Cockley: I offer in evidence Defendant's Exhibit A, being photostatic copy of a certificate of stock 47607 of The Cleveland Railway Company, payable to the order—

The Court: That can all be put in without any specific reference to that. They have all been testified to and used in evidence.

Mr. Cockley: Then I offer in evidence Defendant's Exhibit A.

I offer Defendant's Exhibit B, Defendant's Exhibit C, Defendant's Exhibit D. I offer in evidence the photostatic copy of the inventory of the estate of Charles P. West as filed in the Probate Court, marked Defendant's Exhibit E. I offer Defendant's Exhibit F, being the petition in the case of Charles P. West *et al.* v. The American Telephone & Telegraph Company in the Common Pleas Court.

I offer Defendant's Exhibit G, being the amended answer in the same case in the Common Pleas Court.

I offer Defendant's Exhibit H, being a reply to the amended answer in the same case.

I offer Defendant's Exhibit I, being a stipulation that has been entered into between counsel for the plaintiffs and defendant. May I state, for the information of the court, that this stipulation recites the filing of the former suit in the Common Pleas Court, and it was tried there upon the merits, and judgment rendered in favor of the plaintiffs, subsequently reviewed in error in the Court of Appeals, and disposed of, being remanded to the Court of Common Pleas; that the opinion of the Court of Appeals—there is no opinion of the Court of Appeals filed with the record in that case, but the copy of said opinion furnished by the court to counsel of record. That thereafter proceedings were had to procure motion to certify in the Supreme Court of Ohio, and that was denied. That is the substance of that stipulation, and I offer the stipulation as Defendant's Exhibit I.

Defendant's Exhibit J is offered in evidence, and this is the mandate of the Court of Appeals as it now appears on the Common Pleas docket of Cuyahoga County.

The Court: These items of evidence are all received.

(Oral argument had.)

The Court: Counsel may have until the 15th of January to file briefs. The case is submitted.

PLAINTIFFS' EXHIBIT 1.

Stipulation of Parties With Exhibits Attached.

(Filed December 17, 1937.)

[Caption Omitted.]

It is hereby stipulated between counsel for the respective parties that the following facts are true; that the documents hereto attached are true and correct copies of the instruments of which they purport to be copies; that either party may offer this stipulation or any part of it or any of the documents hereto attached without further or other proof, subject to any objections that the other party may make on the ground of relevancy or materiality.

1. Charles P. West, domiciled for many years in Cuyahoga County, died March 21, 1926. His Last Will and Testament, dated February 15, 1924, was probated in Cuyahoga County, a true copy thereof being hereto attached, marked Exhibit 10.

2. At the date of the death of Charles P. West, he was the owner of 92 shares of common stock of American Telephone & Telegraph Company, to evidence which ownership he held the following certificates duly executed by said Company, to-wit,

Certificate No.	Date Issued	No. of Shares
R 38483	February 17, 1920	9
T 18131	May 17, 1921	18
V 57527	July 20, 1921	5
T 60328	September 22, 1921	20
T 76112	November 18, 1921	5
N 37022	November 1, 1922	11
NJ 3878	November 26, 1923	9
N 82973	August 1, 1924	15
		92

3. On or about February 2, 1927, there was delivered to the American Telephone & Telegraph Company on behalf of Grace C. West at its transfer office in New York City the above-described certificates for 92 shares of its common stock, each of which contained an assignment on the back thereof to Grace C. West, signed "Charles P. West, Grace C. West exec., C. P. West estate." These assignments were duly witnessed and the signature thereon guaranteed by The Cleveland Trust Company. A true and photostatic copy of each of said certificates, together with the assignments endorsed on the back thereof, is hereto

attached, marked respectively Exhibits 1, 2, 3, 4, 5, 6, 7, and 8.

4. At or about the same time that the above certificates were delivered to the American Telephone & Telegraph Company at its said transfer office, there were also delivered to it copies of the following documents, certified by the Judge of the Probate Court of Cuyahoga County, Ohio, and under the seal of said Court, to be full and true copies from the original papers on file and of record in said Court.

(a) Certificate of appointment of Grace C. West as Executrix of the estate of Charles P. West, deceased, a true copy of which is hereto attached, marked Exhibit 9.

(b) Last Will and Testament of Charles P. West, dated February 15, 1924, a true copy of which is attached hereto, marked Exhibit 10.

(c) Application of Grace C. West as Executrix of the estate of Charles P. West for distribution in kind of the stocks and other property held by her as Executrix, dated January 14, 1927, a true copy of which is attached hereto marked Exhibit 11.

(d) Journal Entry of the Probate Court of Cuyahoga County, Ohio, granting said application and ordering distribution in kind, a true copy of which is hereto attached, marked Exhibit 12.

5. Upon receipt of the assigned certificates for 92 shares hereinbefore described, together with the other documents hereinbefore listed, the American Telephone & Telegraph Company on February 2, 1927, issued a new certificate No. NQ 58089 to Grace C. West for 92 shares of the common stock of said Company and delivered the same by mail to Grace C. West. On or about October 31, 1929, said certificate No. NQ 58089 was delivered by said Grace C. West to the office of Paine, Webber & Company, brokers, at Boston, Massachusetts, as collateral for her individual account there, together with an assignment and power of attorney to transfer duly executed to Paine, Webber & Company by said Grace C. West. On or about November 2, 1929, the New York office of Paine, Webber & Company, having received said certificate and assignment from its Boston office, delivered said certificate with the said assignment and power of attorney to the American Telephone & Telegraph Company, and on or about November 4, 1929, the defendant issued a new certificate for said 92 shares to or upon the order of said Paine, Webber & Company. A true and photostatic copy of said certificate No. NQ 58089, together with the assignment and transfer

of her interest therein by Grace C. West is hereto attached, marked Exhibit 13.

6. Along with the assignment of the 92 shares of stock of the defendant represented by said certificate No. NQ 58089 on November 4, 1929, said Grace C. West also assigned in like manner an additional 58 shares of stock of defendant, making an assignment of 150 shares, and which were all transferred on November 4, 1929, from Grace C. West to Paine, Webber & Company, and which were held by said Paine, Webber & Company at its New York office as collateral for Grace C. West's individual stock account at said Paine, Webber & Company until September 24, 1930, at which time said Paine, Webber & Company sold 50 of said shares at $208.00 per share, and 100 of said shares at $208.25 per share on the New Stock Exchange and applied the proceeds of said sales on said individual account of said Grace C. West. Neither Paine, Webber & Company nor the subsequent purchaser knew of any limitation upon the right of Grace C. West to sell the entire interest in said shares.

7. The high, low and last sales of shares of the common stock of the American Telephone & Telegraph Company were as follows on the dates next given:

Date	High	Low	Close
February 2, 1927	153¾	153⅜	153⅝
October 31, 1929	250	240½	246¾
November 4, 1929	248¼	233	237
September 24, 1930	211¾	207⅜	209
June 18, 1937	165	164¼	165
December 16, 1937	147¼	145¾	146

The highest intermediate value between November 4, 1929, and May 4, 1934, both inclusive, was $274.25 on April 14, 1930.

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,
Attorneys for Plaintiffs.

WILLIAM B. COCKLEY,
Attorney for Defendant.

PRINTER'S NOTE:

In all of those Stipulation Exhibits following which are copies of Stock Certificates, the omission of names from the signature lines of the Bankers Trust Company, Registrar, or the omission of the name of the Transfer Clerk of Defendant, signifies that such names were undecipherable.

EXHIBIT 1

Certificate for Less Than One Hundred Shares

Registered

Bankers Trust Company Registrar

By ..... *Assistant Secretary.*

No. R38483
—9 Shares

2-2-27
No. R38483
—9 Shares

Units (1)(2)(3)(4)(5)(6)(7)(8)(9)(0)
Tens (1)(2)(3)(4)(5)(6)(7)(8)(9)( )

Countersigned

American Telephone & Telegraph Company

By .....

(Corporate Seal) *Transfer Clerk.*

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK

AMERICAN TELEPHONE & TELEGRAPH COMPANY.

SHARES $100 EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Nine Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 17th day of Feb., 1920.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

W. J. STOUT,
Assistant Treasurer.

JAMES ROBB,
Vice President.

(*Perforated mark*) Canceled 2-2-27 A T & T Co
(*Perforated mark*) Canceled 2-3-27 B T Co

(*Assignment on Back*)

82393

For Value received, ... hereby sell, assign and transfer unto (Mrs.) Grace C. West, 3134 Berkshire Road, Cleveland Heights, Ohio, all Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated, ... 19....

In Presence of
GRACE C. WEST,
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Signature Guaranteed
THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, *Vice Pres.*
By C. W. STANSBURY, *Vice Pres.*

WPC

For Tax Stamps See CTF. No. NJ3878

PAGES: 50, 52, 54,
56, 58, 60, 62, 64.
ARE BLANK

EXHIBIT 2

Certificate for Less
Than One Hundred Shares

Registered May 17 1921
BANKERS TRUST COMPANY Registrar
By ..... *Assistant Secretary.*

No. T18131
—18— Shares

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK

AMERICAN TELEPHONE & TELEGRAPH COMPANY.

SHARES $100 EACH

THIS IS TO CERTIFY that Chas. P. West is the owner of Eighteen Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 17th day of May, 1921.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

H. D. DUNLAP,
Assistant Treasurer.

T. D. BOWEN,
Vice President.

(*Perforated mark*) Canceled 2-2-27 A T & T Co
(*Perforated mark*) Canceled 2-3-27 B T Co

2-2-27
No. T18131
—18— Shares

Countersigned
AMERICAN TELEPHONE & TELEGRAPH COMPANY
By .....
(Corporate Seal) *Transfer Clerk.*

Units (1)(2)(3)(4)(5)(6)(7)( )(9)(0)
Tens ( )(2)(3)(4)(5)(6)(7)(8)(9)(0)

(*Assignment on Back*)

82393

For Value received .... hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated ....., 19....

In Presence of
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Signature Guaranteed
THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, *Vice Pres.*
By C. W. STANSBURY, *Vice Pres.*

WJC

For Tax Stamps See CTF No. NJ 3878

EXHIBIT 3

2-2-27
No. V57527
5 Shares

Countersigned
Units (1)(2)(3)(4)( )(6)(7)(8)(9)(0)
Tens (1)(2)(3)(4)(5)(6)(7)(8)(9)( )
American Telephone & Telegraph Company
By C. A. Stockbridge,
Transfer Clerk.

No. V57527
5 Shares

Incorporated Under the Laws of the State of New York

AMERICAN TELEPHONE & TELEGRAPH COMPANY.

SHARES $100 EACH

This is to Certify that Charles P. West is the owner of Five Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. Witness the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 20th day of July, 1921.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

E. C. McAllister,
Assistant Treasurer.

T. D. Bowen,
Vice President.

(*Perforated mark*) Canceled 2-2-27 A T & T Co
(*Perforated mark*) Canceled 2-3-27 B T Co

Certificate for Less Than One Hundred Shares

Registered Jul 20 1921
Bankers Trust Company Registrar
By ..... *Assistant Secretary.*

(*Assignment on Back*)

82393

For Value received, ... hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated ....., 19....

In Presence of
P. S. Willson.

Charles P. West,
Grace C. West, Exec.,
C. P. West Estate.

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Signature Guaranteed
The Cleveland Trust Company
By E. S. Curtiss, *Vice Pres.*
By C. W. Stansbury, *Vice Pres.*

WJC

For Tax Stamps See CTF No. NJ 3878

EXHIBIT 4.

2-2-27

No. T60328
20 Shares

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK

AMERICAN TELEPHONE & TELEGRAPH COMPANY.

SHARES $100. EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Twenty Shares of the Capital stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 22nd day of Sept., 1921.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

H. D. DUNLAP,
Assistant Treasurer.

T. D. BOWEN,
Vice President.

(*Perforated mark*) Canceled 2-2-27 A T & T Co
(*Perforated mark*) Canceled 2-3-27 B T Co

Certificate for Less Than One Hundred Shares

Registered
BANKERS TRUST COMPANY Registrar
By ..... *Assistant Secretary.*

No. T60328
20 Shares

Units (1)(2)(3)(4)(5)(6)(7)(8)(9)( )
Tens (1)( )(3)(4)(5)(6)(7)(8)(9)(0)

Countersigned
AMERICAN TELEPHONE & TELEGRAPH COMPANY
By .....
(Corporate Seal) *Transfer Clerk.*

(*Assignment on Back*)

82393

For Value received, ... hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated ....., 19....

In Presence of
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Signature Guaranteed
THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, *Vice Pres.*
By C. W. STANSBURY, *Vice Pres.*

WJC

For Tax Stamps See CTF No. NJ 3878

EXHIBIT 5

Certificate for Less Than One Hundred Shares

Registered Nov 18 1921

BANKERS TRUST COMPANY Registrar

By .....

Assistant Secretary.

No. T76112
5 Shares

2-2-27
No. T76112
5 Shares

Units (1)(2)(3)(4)( )(6)(7)(8)(9)(0)
Tens (1)(2)(3)(4)(5)(6)(7)(8)(9)( )

Countersigned
AMERICAN TELEPHONE & TELEGRAPH COMPANY
By .....
(Corporate Seal) *Transfer Clerk.*

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK

AMERICAN TELEPHONE & TELEGRAPH COMPANY.

SHARES $100 EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Five Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 18th day of Nov., 1921.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

H. D. DUNLAP, *Assistant Treasurer.*

T. D. BOWEN, *Vice President.*

(*Perforated mark*) Canceled 2-2-27 A T & T Co
(*Perforated mark*) Canceled 2-3-27 B T Co

(*Assignment on Back*)

82393

For Value received, ... hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated ....., 19....

In Presence of
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement, or any change whatever.

Signature Guaranteed
THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, *Vice Pres.*
By C. W. STANSBURY, *Vice Pres.*

WJC

For Tax Stamps See CTF No. NJ 3878

EXHIBIT 6

Certificate for Less Than One Hundred Shares

Registered Nov 1 1922
BANKERS TRUST COMPANY Registrar-
By .....
Assistant Secretary.

No. N37022
11 Shares

2-2-27
No. N37022
11 Shares

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK

AMERICAN TELEPHONE & TELEGRAPH COMPANY.

SHARES $100 EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Eleven Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 1st day of November, 1922.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

E. C. MCALLISTER,
Assistant Treasurer.

T. D. BOWEN,
Vice President.

(*Perforated mark*) Canceled 2-2-27 A T & T Co
(*Perforated mark*) Canceled 2-3-27 B T Co

Countersigned
AMERICAN TELEPHONE & TELEGRAPH COMPANY
By C. A. STOCKBRIDGE,
(Corporate Seal) *Transfer Clerk.*

Units ( )(2)(3)(4)(5)(6)(7)(8)(9)(0)
Tens ( )(2)(3)(4)(5)(6)(7)(8)(9)(0)

(*Assignment on Back*)

82393

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

The signature should be guaranteed by an incorporated bank or trust company, or by a New York, Boston, Philadelphia, Chicago or Washington stock exchange member or firm, whose signature is known to the transfer office, or witnessed by a responsible person whose signature is so known. Where it is impracticable to secure such guarantee or witness, the signature should be acknowledged formally before a notary public under his seal.

For Value received, ... hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated, ... 19....

In Presence of
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

Signature Guaranteed
THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, *Vice Pres.*
By C. W. STANSBURY, *Vice Pres.*

WJC

For Tax Stamps See CTF No. NJ 3878

EXHIBIT 7.

No. NJ3878
9 Shares

2-2-27
No. NJ3878
9 Shares

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK

AMERICAN TELEPHONE & TELEGRAPH COMPANY.

SHARES $100 EACH

THIS IS TO CERTIFY that Charles P. West is the owner of Nine Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 26th day of November, 1923.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

E. C. MCALLISTER,
Assistant Treasurer.

T. D. BOWEN,
Vice President.

(*Perforated mark*) Canceled 2-2-27 A T & T Co
(*Perforated mark*) Canceled 2-3-27 B T Co

Registered
BANKERS TRUST COMPANY Registrar
By ..... *Assistant Secretary.*

Countersigned
AMERICAN TELEPHONE & TELEGRAPH COMPANY
By ..... *Transfer Clerk.*
(Corporate Seal)

(*Assignment on Back*)

82393

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

The signature should be guaranteed by an incorporated bank or trust company, or by a New York, Boston, Philadelphia, Chicago or Washington stock exchange member or firm, whose signature is known to the transfer office, or witnessed by a responsible person whose signature is so known. Where it is impracticable to secure such guarantee or witness, the signature should be acknowledged formally before a notary public under his seal.

For Value received, ... hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated ....., 19....

In Presence of
P. S. WILLSON.

CHARLES P. WEST,
GRACE C. WEST, Exec.,
C. P. West Estate.

Signature Guaranteed
THE CLEVELAND TRUST COMPANY
By E. S. CURTISS, *Vice Pres.*
By C. W. STANSBURY, *Vice Pres.*

W.I.C.

($3.68 Stock Transfer Tax Stamps. Canceled)

EXHIBIT 8

Certificate for Less
Than One Hundred Shares

Registered Aug 1 1924

Bankers Trust Company · Registrar

By ..... *Assistant Secretary.*

No. N82973
##15## Shares

2-2-27
No. N82973
##15## Shares

Countersigned
American Telephone & Telegraph Company
By C. B. Small,
(Corporate Seal) *Transfer Clerk.*

Units (1)(2)(3)(4)( )(6)(7)(8)(9)(0)
Tens ( )(2)(3)(4)(5)(6)(7)(8)(9)(0)

Incorporated Under the Laws of the State of New York

AMERICAN TELEPHONE & TELEGRAPH COMPANY.

SHARES $100 EACH

This is to Certify that Charles P. West is the owner of Fifteen Shares of the Capital Stock of the American Telephone and Telegraph Company, transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. Witness the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 1st day of August, 1924.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

E. C. McAllister,
Assistant Treasurer.

T. D. Bowen,
Vice President.

(*Perforated mark*) Canceled 2-2-27 A T & T Co
(*Perforated mark*) Canceled 2-3-27 B T Co

(*Assignment on Back*)

82393

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement or any change whatever.

The signature should be guaranteed by an incorporated bank or trust company, or by a New York, Boston, Philadelphia, Chicago or Washington stock exchange member or firm, whose signature is known to the transfer office, or witnessed by a responsible person whose signature is so known. Where it is impracticable to secure such guarantee or witness, the signature should be acknowledged formally before a notary public under his seal.

For Value received, ... hereby sell, assign and transfer unto Grace C. West all Shares of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint J. P. Mathews Attorney to transfer the said stock on the books of the within named Company with full power of substitution in the premises.

Dated ..... 19....

In Presence of
P. S. Willson.

Charles P. West,
Grace C. West, Exec.,
C. P. West Estate.

Signature Guaranteed
The Cleveland Trust Company
By E. S. Curtiss, *Vice Pres.*
By C. W. Stansbury, *Vice Pres.*

154617 EXHIBIT 9

IN THE PROBATE COURT.

THE STATE OF OHIO,
CUYAHOGA COUNTY, SS.

I, NELSON J. BREWER, Judge of the Probate Court within and for said County, in the State aforesaid, do hereby certify and make known, that on the 5th day of April, one thousand nine hundred and twenty-six, Letters Testamentary on the Estate of Charles P. West, deceased, were granted unto Grace C. West, and the same are now in full force and effect.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Probate Court, at Cleveland, in said County, this 23rd day of September, 1935.

NELSON J. BREWER,
Probate Judge,

(Seal) By FRANK ZIGELMAN,
Deputy Clerk.

EXHIBIT 10

LAST WILL AND TESTAMENT.

I, Charles P. West, of the City of Cleveland Heights, Cuyahoga County and State of Ohio, being of sound mind and disposing memory, do make and publish this my last will and testament, hereby revoking all former wills by me heretofore made.

Item I. I direct that all my just debts and funeral expenses be paid out of my estate as soon after my decease as may be found convenient.

Item II. I give, devise and bequeath to my beloved wife Grace C. West, in lieu of her dower and year's support, the use, income, rents and profits of all of my property of every kind and nature and wheresoever the same may be located, for and during her natural life, to use, enjoy and dispose of the same as she may deem best.

I hereby give to my said wife authority, with the consent and advice of my two sons hereinafter named, without the intervention of the probate court, to convert any or all of my real estate or securities into money and to invest and reinvest the same and any other moneys I may have at the time of my decease, in such manner as she and my said sons may determine.

Item III. After the decease of my said wife, I direct that all of my said property be divided equally between my two sons Charles Peyton West and Maurice John West, share and share alike, or their heirs, per stirpes, or in case of the death of either without leaving lawful heirs of his body, then all of said property shall go to the survivor of them.

I nominate and request the probate court to appoint my said wife Grace C. West, to be executrix of this my last will and testament, or in case of her death or refusal to act, I request the probate court to appoint my two sons above mentioned as co-executors, in her stead, and request that neither she nor they be required to give bond or to file any account with the probate court.

In case it shall become necessary to sell any of my real estate or personal property to pay the debts of my estate, I hereby give my said executrix or executors full authority so to do without the intervention of the probate court.

IN TESTIMONY WHEREOF I have hereunto set my hand to this my last Will and Testament this 15th day of February A. D. 1924.

CHARLES P. WEST.

Signed by the said Charles P. West as his last will and testament in our presence and by us signed as witnesses thereto at his request and in his presence and in the presence of each other this 15th day of February A. D. 1924.

STEPHEN H. PARKER resides at 981 Ansel Rd., Cleve. O.
A. W. BARBER resides at 1503 Warren Rd., Lakewood.

EXHIBIT 11

Doc. 191 No. 154617

In re estate of Charles P. West, Deceased.

State of Ohio
County of Cuyahoga } ss. IN PROBATE COURT.

APPLICATION FOR DISTRIBUTION IN KIND.

Now comes Grace C. West, the duly appointed and qualified executrix of the estate of Charles P. West, deceased, and states to the Court that all of the debts of said estate have been fully paid.

Your applicant further says that among the assets of said estate are:

Cleveland Railway Co. (Capital Stock)	Certificate	52152	Shares	3	Total
	"	51435	"	6	
	"	50475	"	7	
	"	50297	"	5	
	"	47607	"	24	
	"	48537	"	3	
	"	51036	"	4	52
Cleveland Electric Illuminating Co., Preferred	"	GR 1222	"	10	
	"	508	"	15	25
Ohio Public Service Co. Pref.	"	OO 7260	"	10	
	"	O 12119	"	15	25
American Telephone & Telegraph Co. (Capital Stock)	"	18131	"	18	
		37022	"	11	
		T 76112	"	5	
		D 57527	"	5	
		6328	"	20	
		NJ 3878	"	9	
		N 82973	"	15	
		R 38483	"	9	92
M. A. Hanna Co. Preferred	"	OO 3226	"	32	32
Butler Bros. (Capital)	"	D-22620	"	15	15
Superior Brick Co. Pref.	"	164	"	10	10
Superior Brick Co. Common	"	177	"	10	10

Your applicant further says that by the terms of the last will and testament that all said stocks are bequeathed to her for and during her natural life.

Your applicant therefore asks the court to transfer said stocks to her, the within named Grace C. West.

GRACE C. WEST.

Sworn to and subscribed before me this 14th day of Jan. A. D. 1927.

A. F. KOTOWSKI, *Deputy Clerk.*

We the undersigned, Charles P. West, Jr., and Maurice J. West, hereby consent to the foregoing distribution in kind.

CHARLES P. WEST JR. MAURICE J. WEST.

(Filed Jan. 14, 1927.)

EXHIBIT 12

ORDER OF DISTRIBUTION IN KIND.

(Probate Court Caption omitted.)

On this 14th day of January, 1927, this cause came on to be heard on the application of Grace C. West, the duly appointed and qualified executrix of the estate of Charles P. West, deceased, for an order of this Court authorizing

her to distribute certain assets belonging to the estate of said decedent, in kind.

Whereupon, the Court, being fully advised in the premises, finds that all the debts of said decedent have been fully paid, and that there are now no claims outstanding against said estate. The Court further finds that among the assets belonging to said decedent's estate still in the possession of said executrix, are the following stocks, to wit:

Cleveland Railway Co. (Capital Stock)	Certificate		52152	Shares	3	Total
	"		51435	"	6	
	"		50475	"	7	
	"		50297	"	5	
	"		47607	"	24	
	"		48537	"	3	
	"		51036	"	4	52
Cleveland Electric Illuminating Company, Preferred	"	GR	12224	"	10	
	"		508	"	15	25
Ohio Public Service Co. Pref.	"	OO	7260	"	10	
		O	12119	"	15	25
American Telephone & Telegraph Co. (Capital Stock)	"		18131	"	18	
	"		37022	"	11	
		T	76112	"	5	
		D	57527	"	5	
			6328	"	20	
		NJ	3878	"	9	
		N	82973	"	15	
		R	38483	"	9	92
M. A. Hanna Co. Preferred	"	OO	3226	"	32	32
Butler Bros. (Capital)	"	D	22620	"	15	15
Superior Brick Co. Pref.	"		164	"	10	10
Superior Brick Co. Common	"		177	"	10	10

The Court further finds that by virtue of the terms of the last will and testament of the said Charles P. West, deceased, all of said stocks are bequeathed to Grace C. West, his widow, for and during her natural lifetime, and that she is desirous of having the said stocks distributed unto herself in kind. The Court further finds that all of the next of kin of said decedent have duly consented in writing to such distribution.

Wherefore said application is granted, and it is by the Court ordered that said applicant, Grace C. West, be and she is hereby authorized and directed to distribute in kind and transfer unto herself as the widow of said Charles P. West, deceased, and the distributee entitled thereto, the aforesaid stocks, as prayed for. Jour. 272 page 424.

(Probate Record Duly Certified.)

Certificate for Less Than One Hundred Shares

Registered Feb 2 1927
BANKERS TRUST COMPANY Registrar
By ..... *Assistant Secretary.*

No. NQ58089
92 Shares

11-4-29
No. NQ58089
92 Shares

Units (1)( )(3)(4)(5)(6)(7)(8)(9)(0)
Tens (1)(2)(3)(4)(5)(6)(7)(8)( )(0)

Countersigned
AMERICAN TELEPHONE & TELEGRAPH COMPANY
By C. B. SMALL,
Transfer Clerk.

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK

AMERICAN TELEPHONE & TELEGRAPH COMPANY.

SHARES $100 EACH

THIS IS TO CERTIFY that Grace C. West is the owner of Ninety-Two Shares of the Capital Stock of the American Telephone and Telegraph Company transferable only on the Books of the Company in person or by attorney upon surrender of this certificate. WITNESS the seal of the Company and the signatures of its President or one of its Vice Presidents and of its Treasurer or an Assistant Treasurer this 2nd day of February, 1927.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK, BOSTON OR CHICAGO.

THIS CERTIFICATE IS NOT VALID UNTIL COUNTERSIGNED BY THE TRANSFER CLERK AND THE REGISTRAR.

H. N. DUNHAM,
Assistant Treasurer.

T. D. BOWEN,
Vice President.

Canceled

(*Perforated mark*) Canceled 11-4-29 A T & T Co
(*Perforated mark*) Canceled 11-4-29 B T Co

Power of Attorney Attached.

We hereby certify that we have no ownership or interest in the shares of the stock above transferred, the transfer by the owner to us being merely for the purpose of sale.

PAINE, WEBBER & Co.,
25 Broad St., N. Y. C.

This space must not be covered in any way

Transfer of Stock.

KNOW ALL MEN BY THESE PRESENTS, That ..... for value received have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto Paine, Webber & Co., 25 Broad St., New York, 92 Shares of the capital stock of the American Tel. & Tel. standing in my name on the books of said corporation represented by Certificate No. NQ58089 herewith and do hereby constitute and appoint Paine, Webber & Co. true and lawful attorney, irrevocable for .... and in .... name and stead, ... to sell, assign, transfer and set over, all or any part of said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that .... said attorney or .... substitutes shall lawfully do by virtue hereof.

Date Nov. 2-1929

Signed and acknowledged in the presence of
R. M. Brown.

GRACE C. WEST.
Signature Guaranteed by Paine, Webber & Co.

We hereby irrevocably constitute and appoint N. Lurie our substitute to transfer the within named stock under the foregoing power of attorney with like power of substitution.

Witness:
.....

New York, Nov. 2, 1929
PAINE, WEBBER & Co.

PLAINTIFFS' EXHIBIT 2.

Vol. X, The Ohio Bar Association Report of April 12, 1937, pages 369 to 381, inclusive.

(Filed December 17, 1937.)

WEST ET AL., APPELLEES, *v.* AMERICAN TELEPHONE & TELEGRAPH CO., APPELLANT.

Corporations—Wrongful transfer of stock—Conversion—Life estate in stock with remainder over—Transfer to life tenant absolutely—Sale and transfer to bona fide purchaser—Corporation liable for return of stock—Action by remaindermen for damages—Demand for return prerequisite.

1. A wrongful transfer by a corporation of certificates of its stock, with knowledge of the rights therein of a third person, will render such corporation liable as for conversion.
2. Where title to stock is vested in one for life, with remainder in another, and the corporation wrongfully transfers such stock to the life tenant absolutely, and thereafter transfers it to a bona fide purchaser from such life tenant, the remainderman is entitled to demand of the corporation the return of these certificates of stock or of other stock of equal par value, the same to be issued in such a manner as will protect the interests of all parties concerned.
3. In the event of refusal or inability to comply with such demand the remainderman may maintain an action against the corporation for damages for such refusal or failure. But until such demand is made, no cause of action exists against the corporation.

(Decided November 9, 1936.)

APPEAL: Court of Appeals for Cuyahoga county.

Messrs. Garfield, Cross, Daoust, Baldwin & Vrooman, and *Mr. Maurice J. West,* for appellees.

Messrs. Tolles, Hogsett & Ginn, Mr. William B. Cockley and *Mr. P. J. Mulligan,* for appellant.

MONTGOMERY, J. Charles P. West, Sr., died March 21, 1926, leaving as his next of kin the two plaintiffs-appellees, his sons, and leaving his widow, Grace C. West, who was, incidentally, both the aunt and the stepmother of the plaintiffs. The widow and the two sons are all now living.

The decedent died testate, and items two and three of his will are in the following language:

"Item II. I give, devise and bequeath to my beloved wife Grace C. West in lieu of her dower and year's support, the use, income, rents and profits of all of my property of every kind and nature and wheresoever the same may be located, for and during her natural life, to use, enjoy and dispose of the same as she may deem best.

"I hereby give to my said wife authority with the consent and advice of my two sons hereinafter named, with-

out the intervention of the Probate Court, to convert any or all of my real estate or securities into money and to invest and reinvest the same and any other moneys I may have at the time of my decease, in such manner as she and my said sons may determine.

"Item III. After the decease of my said wife, I direct that all my said property be divided equally between my two sons, Charles Peyton West, and Maurice John West, share and share alike or their heirs per stirpes, or in case of the death of either without leaving lawful heirs of his body, then all of said property shall go to the survivor of them."

The widow was named as executrix, without bond, qualified as such in the Probate Court of Cuyahoga county, paid all the debts of the estate and the costs of administration. Thereafter, on January 14, 1927, the executrix filed in the Probate Court of Cuyahoga county an application which listed among the assets of the estate shares of the capital stock of various corporations, included therein being 92 shares of the capital stock of the appellant, American Telephone & Telegraph Company. The application recited:

"Your applicant further says that by the terms of the last will and testament that all said stocks are bequeathed to her for and during her natural life. Your applicant, therefore, asks the court to transfer said stocks to her, the within named Grace C. West."

Attached to this application appeared the following, duly signed:

"We, the undersigned, Charles P. West, Jr., and Maurice J. West, hereby consent to the foregoing distribution in kind."

The Probate Court entered an order which, after reciting the application and the consent heretofore referred to, concluded with:

"Wherefore said application is granted, and it is by the court ordered that said applicant, Grace C. West, be and she is hereby authorized and directed to distribute in kind and transfer unto herself as the widow of said Charles P. West, deceased, and the distributee entitled thereto, the aforesaid stocks as prayed for."

On February 2, 1927, Grace C. West delivered at the transfer office of the appellant in New York City the certificates for the 92 shares duly endorsed by her as executrix, together with a certified copy of the will of the decedent, of her application with the consent of the appellees attached, and of the journal entry of the Probate Court, and, upon the production of these documents, the appellant caused to

be issued a new certificate for said 92 shares to Grace C. West, individually, and without limitation.

Some time thereafter, presumably in 1929, Grace C. West sold these shares of stock represented by her certificate to an innocent purchaser for value, and on November 2, 1929, this purchaser presented the certificate, with the duly executed transfer by Grace C. West, at the transfer office of the appellant and obtained in lieu thereof a new certificate issued to such bona fide purchaser.

The record shows that the appellees had no notice until the spring of 1934 of the fact that the stock had been transferred to Grace C. West individually, or that she had sold and transferred the same to any other person. In June, 1934, they brought suit against the appellant for the value of the stock on the theory of conversion.

The amended answer filed by the company contained three defenses: first, that each of these transfers made by it was regularly and properly made, and that consequently there was no liability attached to it; second, that the plaintiffs were estopped by their conduct from raising this claim in this action; and, third, that their cause of action, if any, was barred by the statute of limitations of four years.

The cause came on for trial in the Court of Common Pleas before a jury, and, during the progress of the trial, by consent of counsel the jury was discharged and the cause was submitted to the court. While the trial court in his opinion used expressions which might indicate an uncertainty as to the nature of plaintiffs' cause of action, he, nevertheless, apparently did treat the cause as one for damages for trover or wrongful conversion of property, and found on behalf of the plaintiffs and rendered judgment against the defendant in the sum of $29,526.47, being the amount which he found to be the value of the stock as of November 4, 1929, together with interest thereon at 6% from that date.

From that judgment an appeal was perfected to this court upon questions of law. For some reason counsel for appellant do not assign as error the failure of the trial court to sustain the motion of the defendant for judgment at the conclusion of the plaintiff's evidence, or at the conclusion of all the evidence, although the record shows that such motions were made. However, one assignment of error is that the court overruled the appellant's motion for a new trial, and a reference to that motion shows that one ground of it was that the judgment of the trial court was contrary to law, and it seems to us that counsel have thereby saved the question, and that this court can with propriety consider the proposition as to whether or not the

defendant was entitled to judgment upon the pleadings and the evidence.

We find no difficulty in arriving at the conclusion that this corporation was at fault in making these transfers as they were made. It had before it a copy of the will of the testator with the other papers attached. These papers clearly show that Grace C. West had only a life estate in the property and that these appellees had an interest therein as remaindermen. The company was put upon its guard, and in issuing new certificates of stock did so at its peril, if it did not issue the same in accordance with the rights of the interested parties thereto. Having made this wrongful transfer to the widow in 1927, it was not protected or saved by her subsequent transfer of the stock to a bona fide holder in 1929. While, as stated by counsel for the appellees, the original transfer to the executrix, as an individual, was wrongful, the subsequent transfer to an innocent holder wrought the harm.

Furthermore, we cannot, and do not, find that the plaintiffs were estopped from asserting any claim against this corporation; they consented to nothing more than the distribution of the stock in kind.

The general proposition is correctly stated in 6 Thompson on Corporations (3 Ed.) 307, Section 4435, wherein it is held that:

"A wrongful transfer with knowledge of the claims or rights of a third person will render a corporation liable as for conversion."

An interesting case is that of *Stewart et al., Trustees,* v. *Firemen's Ins. Co. of Baltimore,* 53 Md., 564, where, in discussing a state of facts somewhat similar to the facts in the instant case, the court held:

"There was such negligence on the part of the appellee's officers, (it being chargeable with knowledge,) in allowing the transfers of the stock to be made, as rendered the appellee responsible to appellants for the resulting loss."

There is, therefore, in our judgment, no question as to the wrongful and harmful act of this corporation, and that, as a result thereof, the appellees have some basis of action against it. Taking the view which we do, however, there is no occasion for passing upon the defense of the statute of limitations or the question as to whether the trial court correctly figured the damages, and these two matters become altogether unimportant.

In this case, under the facts as shown, the appellees are remaindermen. They have not at any time had, or do they

now have, the right of possession of the original certificates of stock, or of any certificates issued in lieu thereof. They have not at any time been, and are not now, entitled to any dividends upon this stock. These rights would accrue to them only upon the death of the widow. Until that time they have no right to anything in connection with this stock other than the right to have their title as remaindermen therein protected and assured.

The rule is well stated in paragraph ten of the syllabus of the case of *Carpenter* v. *Denoon,* 29 Ohio St., 379, in this language:

"A deed of conveyance by a tenant for life purporting to convey the title in fee, passes the life estate, but does not forfeit it to the reversioner or remainderman."

Of course, that case deals with real estate, but there is no difference in principle between the two, and, in our judgment, the rule there propounded is applicable to the instant case. We cannot accede to the claim of acceleration advanced by counsel for the appellees.

As we have heretofore stated, these appellees are entitled to some relief against this corporation. In our judgment they are entitled to demand of the company the return of these certificates of stock, or of other stock of equal par value, the same to be issued in such a manner as will protect the interests of all parties concerned, and will insure to these appellees the possession of the certificates and dividends thereon from and after the death of the life tenant. They are entitled, further, in the event of refusal or inability to comply with this demand, to maintain an action for damages for such refusal or failure. Until they have made such demand they have not, in our judgment, any cause of action against this corporation.

"A corporation is liable in conversion for refusal to transfer stock on its books at request of one entitled thereto." Bates' Pleading, Practice, Parties & Forms (4 Ed.), 1109, Section 1203d.

"While an action in equity may be resorted to by the transferee of stock to compel the issuance of a new stock certificate in place of the old one, and is probably the most complete and just remedy, the transferee may treat the refusal to transfer as a conversion, and bring an action at law against the corporation for damages." 10 Ohio Jurisprudence, 438, Section 317.

"Where a corporation permits an erroneous or wrongful transfer of stock, it may be compelled to replace it if there are other shares within its control, or, if there are no other shares within its control, it must respond in damages." 14 Corpus Juris, 776.

In the case of *Stewart* v. *Firemen's Ins. Co., supra,* the court further held that the complainants were entitled to a decree compelling the company to replace the stock on their books in their names as trustees and issue a proper certificate therefor, or to pay them the market value of the stock at the time of the unauthorized transfers.

Attention is directed to the case of *Cleveland & Mahoning Rd. Co.* v. *Robbins,* 35 Ohio St., 483, which was a case where the railroad corporation had wrongfully issued a certificate of stock without first taking up the outstanding certificate in lieu of which the new one was issued, and the court held that the holder of the outstanding certificate had a cause of action against the railroad company. The first paragraph of the syllabus in that case is as follows:

"The issuing of the new certificates to B. & P., and the allowing the transfer of the stock to them, was a breach of the duty which the company owed to F., as the holder of the original certificates, and this breach of duty created a liability on the company to replace the stock to which F. was entitled, or to account for its value."

An interesting case is that of *Allen, Exr.,* v. *Globe Ins. Co.,* 19 W. L. B., 198, 10 Dec. Rep., 204, a decision of the Superior Court of Cincinnati. That case, based upon facts having some similarity to the instant case, held that the wife took the personal property for life; that the presentation of the certificates of stock for transfer, the company being informed of the existence of the will fixing the several estates therein, that the latter is presumed to have knowledge of the contents of the will and is chargeable with liability to a stockholder for the value of the stock wrongfully transferred by the officers of the company. The concluding statement in the opinion is:

"As the company caused the transfer without due authority, it is bound to return to the present executor, the same or an equal amount of the stock, or to pay the value of the same in money, and for the amount of the dividends declared since the wrongful transfer."

The essential difference in the facts between the two cases, as directed to the last clause in the foregoing quotation, is that it did not involve the distinction between dividends accruing during and after the lifetime of the life tenant.

Attention is directed to the case of *Marbury* v. *Ehlen,* 72 Md., 206, 19 A., 648, decided by the Court of Appeals of Maryland. That case not only holds, as we hold here, the corporation liable, but also negativing the claim of acceleration by the wrongful transfer, holds that the fund must re-

main intact while the trustee is alive, and is, as we view it, authority for the proposition that the corporation must restore this stock or its equivalent, insuring dividends to the appellees after the death of the widow, but permitting the payment of dividends until that time solely, to bona fide holders of the stock. The syllabus in the case of *Marbury* v. *Ehlen, supra,* as reported in 19 A., is as follows:

"1. Where stock on the books of a corporation in the name of a testator is transferred to a trustee by the executors under authority in his will, and the trustee afterwards assigns the stock on the books to another without an order from the orphan's court, as required by Code Md. 1860, art. 93 Sec. 274, and in violation of the terms of the will, and in fraud of the *cestuis que trustent,* the corporation is chargeable with knowledge of the limited powers of the trustee, and liable notwithstanding the lapse of time between the two transfers. The corporation, having been once informed that there was a will under which the trustee must act, continues chargeable with a knowledge of its terms.

"2. An assignment to the trustees of all the interests of the *cestuis que trustent* except one cannot help the corporation, since by the will the trust is for the benefit of the trustee's children now living, or that may hereinafter be born, and, the trustee being still alive, the full effect of the assignment cannot be determined, though ultimately the corporation will be entitled to be subrogated to the shares of those who have released. Until the death of the trustee the fund must remain as an entirety."

Counsel for appellees have cited and commented upon many other cases both in their briefs and in their oral argument, but none of these cases cited or commented upon are, in our judgment, parallel to the instant case, nor do the decisions therein establish any binding precedent. Those cited cases have to do with the wrongful refusal of the corporation to transfer stock to one entitled thereto, or when brought by remaindermen were brought when the same were entitled to possession, and after the death of the several life tenants.

An exception to this proposition is to be noted in the case of *Coffey* v. *Wilkerson,* 58 Ky., 101, decided in 1858. This case is cited by counsel for the appellees as sustaining their contention that there was an acceleration of the title to the remaindermen. The first paragraph of the syllabus of that case reads as follows:

"1. If the tenant of the life estate in slaves sell the absolute right and title in them to a negro-trader, who fol-

lows the business of taking slaves to a southern market, such sale is a conversion of the slaves to his own use in such manner as to defeat the estate in remainder, and a right of action accrues *eo instanti* to the remainder-man against the tenant for life, for the value of the slaves, &c."

The facts in that case, however, show that the purchaser of the slaves from the life tenant had sold them and they had been taken to parts unknown, and, as the court stated in its opinion, "with the effect of defeating the enjoyment of the estate in remainder." Of course, with the slaves transported to places unknown there could be no enjoyment of their use by the remaindermen when they should be entitled to possession. That is not the situation in the instant case, in view of what we have indicated, as to the rights and duties of the parties hereto.

It is to be observed that in Ohio the title to shares of stock is now determined by the Uniform Stock Transfer Act, being Sections 8673-1 *et seq.*, General Code. In Section 8673-1 it is prescribed that the title to a certificate and to shares represented thereby can be transferred only (a) by delivery of the certificate properly endorsed, or (b) by delivery of the certificate and a separate document containing a written assignment of the certificate for power of attorney to sell the same, etc.

A majority of this court had occasion to cite and construe this section as an incident to its decision in the case of *Kellogg-Mackay Co.* v. *O'Neal,* 39 Ohio App., 372, 381, 177 N. E., 778.

The other member of this court, as now constituted, and his associates of the First Appellate District, held in the case of *Pure Oil Co.* v. *Hunt, Recr.,* 46 Ohio App., 329, 188 N. E., 738, in the third and fourth paragraphs of the syllabus as follows:

"3. Corporation cannot be held for conversion of stock unless in some way it directly repudiates title of owner by refusing to give certificate force given it by statute (Sections 8673-1, 8673-6, 8673-7 and 8673-17, General Code).

"4. In an action for conversion of stock, permitting jury to allow recovery based on acts of corporation in canceling certificates upon its books *held* erroneous, since under Uniform Stock Transfer Act it is necessary to allege and prove direct, definite refusal by corporation to acknowledge rights conferred on owner of stock by his possession of certificate therefor (Sections 8673-1, 8673-6, 8673-7, 8673-17 and 8623-30*a*, General Code)."

On page 333 of this case the court in its opinion held:

"If transfer of title can only be effected by delivery of the certificate, then the corporation, in order to cause a conversion of the stock, must in some way directly repudiate the title of the owner by refusing to give the certificate the force given it by the statute. Until it does so, while it may commit acts which may give the owner a right to cause rescission, there can be no conversion."

We note that our U. S. Circuit Court of Appeals, Sixth Circuit, in the case of *American Steel Foundries* v. *Hunt,* 79 F. (2d), 558, 561, approved the decision in the case of *Pure Oil Co.* v. *Hunt, Recr., supra.* The court, in the third paragraph of the syllabus in that case, held:

"3. Trover will lie for conversion of corporate shares, where transfer upon corporation's books passes title, or where transfer was caused by corporation's agents, or where corporation by some overt act in violation of its trusteeship repudiates shareholder's ownership."

In the course of its opinion, referring to the facts in the case of *American Steel Foundries* v. *Hunt, supra,* the court said at page 561: "Here there was neither allegation nor evidence of demand and refusal; nor evidence of any positive repudiation of appellee's ownership."

It follows that the judgment of the Court of Common Pleas will be reversed, and final judgment may be entered for the appellant.

Judgment reversed.

Ross, J., concurs.

SHERICK, J., concurs in judgment.

SHERICK, J., concurring. I concur with my associates in the conclusion reached and the reasons assigned, except in one respect. It is my notion that the appellees' right of possession, with the proper noted limitation, has been accelerated.

Carpenter v. *Denoon,* 29 Ohio St., 379, is sound. Its application to shares of corporate stock, negotiable by endorsement and delivery, to me seems improper. A life tenant attempting to convey away the fee of real estate can convey no more than the life estate. His grantee may enjoy it, but he must return the fee at the death of the life tenant. In the case of the stock in question, the innocent purchaser need not restore anything; possession, voting power, or the right to future dividends. The corpus of the bequest with all its attributes has completely passed. Therefore, the rights or position of the life tenant's assignee plays no part in the question of acceleration. Surely the

remaindermen are entitled to possession as against the corporation which made the wrong possible. Its convenience should not be considered.

I do not read *Marbury* v. *Ehlen*, 72 Md., 206, 19 A., 648, as do my associates. The remainder in that case was left to a class that might have been augmented or decreased. The remaindermen were not determinable until the death of the life tenant. It was therefore proper that the bequest be held in its entirety until death of the life tenant determined who should receive the remainder. In the present controversy the remaindermen are determined and entitled to immediate personal possession, limited as to earnings before the death of the life tenant.

The author of the note appearing in 18 L. R. A. (N. S.), 272, which cites *Holdren* v. *Holdren*, 78 Ohio St., 276, 85 N. E., 537, states the general rule of acceleration of possession in those cases where a widow renunciates the provisions of a will in her favor, in this fashion:

"Unless a contrary intention on the part of the testator is manifest, a renunciation by the widow of a life interest given her by the terms of the will is equivalent to its termination by her death * * *. The rule rests upon the theory that the life estate or interest is presumably to be regarded as in the nature of a charge upon the gift over, the abolition of which permits the ultimate disposition to take immediate effect."

If such happens when a widow relinquishes a life tenancy, surely the same effect must follow when she does an act with respect to this legacy's remainder which destroys the charge upon the gift over, in so far as she or her assignee is concerned.

Ross, J., of the First Appellate District, and Montgomery and Sherick, JJ., of the Fifth Appellate District, sitting by designation in the Eighth Appellate District.

81

M. J. WEST, Special
ATTORNEY AT LAW
ENGINEERS BUILDING

No. 1[illegible]

CLEVELAND, O. 9/17 193[illegible]

PAY TO THE ORDER OF Grace C. West $13 45/100

Thirteen 45/100 DOLLARS

NATIONAL CITY BANK OF CLEVELAND
CLEVELAND, OHIO. 6-12

M. J. WEST, Special
M. J. West

(Check No. [illegible])

Please pay to [illegible] Spittler
[illegible] West
[illegible] Spittler

MAY 24 1933

PAY TO THE ORDER OF ANY BANK OR BANKER OR THRU THE CLEVELAND CLEARING HOUSE
4 6-1 D
PRIOR ENDORSEMENTS GUARANTEED
FEDERAL RESERVE BANK OF CLEVELAND
MAY 26 1933

M. J. WEST, Special
ATTORNEY AT LAW
ENGINEERS BUILDING

No. 137

CLEVELAND, O. 9/18 193[illegible]

PAY TO THE ORDER OF Grace C. West $15 00/100

Fifteen DOLLARS

NATIONAL CITY BANK OF CLEVELAND
CLEVELAND, OHIO. 6-12

M. J. WEST, Special
M. J. West

(Check No. 137)

Please pay to
Helen C. Spittler
Grace C. West
Helen C. Spittler

PAY TO THE ORDER OF ANY BANK BANKER OR TRUST CO.
FEDERAL RESERVE BANK
OR ORDER
PRIOR ENDORSEMENTS GUARANTEED
SEP 22 1933
THE FIRST NATIONAL BANK OF BOSTON
5-39

PAY TO THE ORDER OF ANY BANK OR BANKER
4 D
SEP 25 1933

(Check No. 137)

Please pay to
Helen C. Spitzler
Grace C. Heck
Helen C. Spitzler

THE CLEVELAND TRUST CO.
CLEVELAND, OHIO
SEP 22 1933
FIRST NATIONAL BANK
5-39

SEP 29 1933

(Check No. 108)

NO. 108 CLEVELAND, O. SEP 22 1933

PAY TO THE ORDER OF

$ [illegible]

NATIONAL CITY BANK
OF CLEVELAND
CLEVELAND, OHIO.
6-12

DATE M. J. LEWIST, Special
ATTORNEY-AT-LAW
ENGINEERS BUILDING

(Check No. 168)

Please pay to
Helen C. Spitzler
Grace C. Heck
Helen C. Spitzler

THE CLEVELAND TRUST CO.
CLEVELAND, OHIO
NOV 13 1933
FIRST NATIONAL BANK
8-39

PAGES : 82, 84, 86,
88, 90, 92, 94, 96, 98,
100 ARE BLANK

M. J. WEST, Special
ATTORNEY-AT-LAW
ENGINEERS BUILDING

No. 229

CLEVELAND, O. 193

PAY TO THE ORDER OF Grace G. West $

EXACTLY NINETEEN DOLLARS NO CENTS DOLLARS

NATIONAL CITY BANK OF CLEVELAND
CLEVELAND, OHIO. 6-12

M. J. WEST, Special
M. J. West

HARRIS LITHO CO. CLEVELAND O.

(Check No. 229)

Please pay to
Grace G. West

FEDERAL RESERVE BANK
PRIOR ENDORSEMENTS GUARANTEED
JAN -9 1934
THE FIRST NATIONAL BANK

FILED
DEC 1 1937

Case No. 5622
PLAINTIFF'S EXHIBIT
No. 3

PAY TO THE ORDER OF
CLEARING HOUSE
PRIOR ENDORSEMENTS GUARANTEED
FEDERAL RESERVE BANK
4 6-1 D 6-1

M. J. WEST, Special
ATTORNEY-AT-LAW
ENGINEERS BUILDING

No. 259

CLEVELAND, O. 193

PAY TO THE ORDER OF Grace G. West $

EXACTLY NINETEEN DOLLARS DOLLARS

NATIONAL CITY BANK OF CLEVELAND
CLEVELAND, OHIO. 6-12

M. J. WEST, Special
M. J. West

HARRIS LITHO CO. CLEVELAND O.

M. J. West

DEFENDANT'S EXHIBIT A (Sheet 1)

INCORPORATED
UNDER THE LAWS OF THE STATE OF OHIO.

47607

---24---

Capital Stock $25,000,000.

THE CLEVELAND RAILWAY COMPANY

This Certifies that -----CHARLES P. WEST-----

entitled to ------TWENTY FOUR------ shares of the Capital Stock of The Cleveland Railway Company, transferrable only on the books of the Company in person or by Attorney, on surrender of this Certificate.

This Certificate is not valid unless countersigned by the Transfer Agent and also by the Registrar.

Witness the seal of the Company and the signatures of the President and Secretary.

Dated at Cleveland, Ohio, this 19th day of November A.D. 23

THE UNION TRUST CO. CLEVELAND, OHIO

COUNTERSIGNED TRANSFER AGENT

REGISTERED

SECRETARY

PRESIDENT

NOV 19 1923

TENS UNITS

GUARDIAN TRUST CO. CANCELLED DEPT.

DEFENDANT'S EXHIBIT A.

Copy of Stock Certificate No. 47607 (24 Shares) of The Cleveland Railway Company, with Irrevocable Stock Power attached.

(Filed December 17, 1937.)

SIGNATURES VERIFIED
LOST CTF. CARDS
RECEIVED FROM Grace G. West
RECEIPT No. 6201

For Value Received ____ hereby sell, assign and transfer unto

Mrs. Grace G. West ... Shares

of the Capital Stock represented by the within Certificate and do hereby irrevocably constitute and appoint

The Union Trust Company

Attorney

to transfer the said stock on the Books of the within named Company with full power of substitution in the premises.

Dated _____ 19__

Chas. P. West

Grace C. West

Chas. P. West Executor

In Presence of

Notice: The Signature to this assignment must correspond with the name as written upon the face of the Certificate in every particular without alteration or enlargement or any change whatever.

DEFENDANT'S EXHIBIT A (Sheet 2)

RE-ISSUED IN CERTIFICATE No. 02492

DEFENDANT'S EXHIBIT A (Sheet 3)

Y7-87 5M 11-22

IRREVOCABLE STOCK POWER

Know all Men by these Presents,

That I Chas. P. West - Grace C. West Estate
Chas. P. West Estate

for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto Myself, Grace C. West

5 V

shares of the Capital stock of the Cleveland Railway Co.

standing in my name on the books of the company

The Union Trust Company

and do hereby constitute and appoint

true and lawful attorney, irrevocable for and in name and sted, to assign, transfer and set over, all or any part of the said stock, and for that purpose, to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that said attorney, or substitute or substitutes shall lawfully do by virtue hereof.

IN WITNESS WHEREOF, we have hereunto set hand S

the 31st day of January 19 27

Witness:
Helen M. Spittler

Charles P. West Jr.
W. J. West

DEFENDANT'S EXHIBIT B (Sheet 1)

CERTIFICATE FOR LESS THAN 100 SHARES

NUMBER C3226

SHARES

INCORPORATED UNDER THE LAWS OF THE STATE OF OHIO.

HANNA

CERTIFICATE FOR LESS THAN 100 SHARES

The M. A. Hanna Company

SEVEN PER CENT. CUMULATIVE FIRST PREFERRED STOCK, SERIES A.

THIS CERTIFICATE IS TRANSFERABLE EITHER IN NEW YORK OR CLEVELAND.

CANCELLED FEB 2 1927

This Certifies that ---CHARLES P. WEST---

is the owner of ---THIRTY TWO--- fully paid

and non-assessable shares OF THE PAR VALUE OF ONE HUNDRED DOLLARS ($100) EACH OF THE SEVEN PER CENT. CUMULATIVE FIRST PREFERRED STOCK, SERIES A.

of The M. A. Hanna Company transferable on the books of the Company by said owner in person or by his duly authorized

FIRST PREFERRED SERIES A

Preferred Stock and Common Stock of the Company is endorsed hereon. This certificate is not valid

registered by a Transfer Agent and registered by a Registrar of the Company.

In Witness Whereof, the Company has caused this certificate to be signed by its proper

officers and its corporate seal to be hereunto affixed this March 14th, 1924

COUNTERSIGNED: THE UNION TRUST COMPANY, (CLEVELAND, OHIO) TRANSFER AGENT.

MAR 14 1924

REGISTRAR.

ASSISTANT SECRETARY.

PRESIDENT.

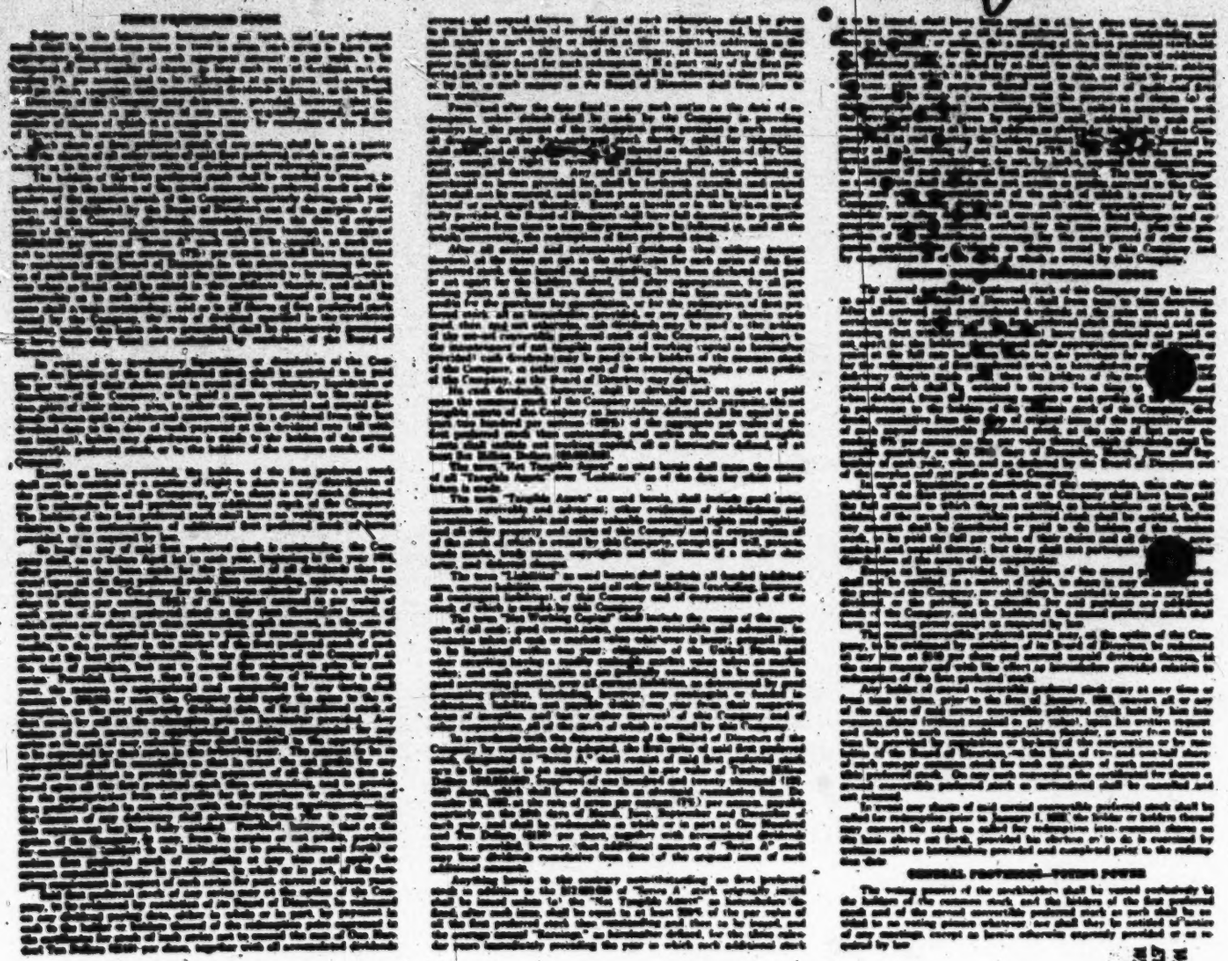
SECRETARY.

DEFENDANT'S EXHIBIT B.

Copy of Stock Certificate No. C03226 (32 Shares) of The M. A. Hanna Company, with Irrevocable Stock Power attached.

SIGNATURES VERIFIED
LOST CTF. CARDS
RECEIVED FROM Grace C West
6-202

SUMMARY OF CERTAIN RIGHTS, PRIVILEGES, PRIORITIES, PREFERENCES, VOTING POWERS, CONVERSION AND LIMITATIONS OF AND UPON THE FIRST PREFERRED STOCK, THE SECOND PREFERRED STOCK AND THE COMMON STOCK OF THE M. A. HANNA COMPANY.



DEFENDANT'S EXHIBIT B (Sheet 2)

For value received ____ hereby sell, assign and transfer unto

Mrs. Grace C. West

3134 Berkshire Road, Blue Lights, Cleveland Ohio

of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint

The Union Trust Company Attorney

to transfer the said Stock on the books of the within named Company with full power of substitution in the premises.

Dated ____ 19 ____

Chas. A. Hess

In presence of

Grace C. West Cert.

C. A. West Executor

NOTICE: THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE, IN EVERY PARTICULAR, WITHOUT ALTERATION OR ENLARGEMENT, OR ANY CHANGE WHATSOEVER.

POWER OF ATTORNEY ATTACHED HERETO

RE-ISSUED IN CERTIFICATE, No. 90 4491

DEFENDANT'S EXHIBIT B (Sheet 3)

0-59 5M 11-22

IRREVOCABLE STOCK POWER

Know all Men by these Presents,

That I Chas P. West - Grace C. West Estate
C. West Estate

for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto ½ Wm Z Grace C West

32

shares of the Capital stock of the M. a. Stanwix Co.

standing in my name on the books of the company

and do hereby constitute and appoint The Union Trust Company

true and lawful attorney, irrevocable for and in name and sted, to assign, transfer and set over, all or any part of the said stock, and for that purpose, to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that said attorney, or substitute or substitutes shall lawfully do by virtue hereof.

IN WITNESS WHEREOF, we have hereunto set hands, the 31st day of January 19 27

Witness:
Helen B. Spittler

Charles P. West Jr.
W. J. West

DEFENDANT'S EXHIBIT C (Sheet 1)

DEFENDANT'S EXHIBIT C.
Copy of Stock Certificate No. CO4491 (32 Shares) of The M. A. Hanna Company.
(Filed December 17, 1937.)

SIGNATURES VERIFIED
LOST CTF. CASE
RE...
Mrs. Grace C. West
E8799

SUMMARY OF CERTAIN RIGHTS, PRIVILEGES, PRIORITIES, PREFERENCES, VOTING POWERS, CONDITIONS AND LIMITATIONS OF AND UPON THE FIRST PREFERRED STOCK, THE SECOND PREFERRED STOCK AND THE COMMON STOCK OF THE M. A. HANNA COMPANY.

FIRST PREFERRED STOCK

[illegible]

SECOND CONVERTIBLE PREFERRED STOCK

[illegible]

GENERAL PROVISIONS—VOTING POWER

[illegible]

NOTICE: THE SIGNATURE TO THIS ASSIGNMENT MUST CORRESPOND WITH THE NAME AS WRITTEN UPON THE FACE OF THE CERTIFICATE IN EVERY PARTICULAR, WITHOUT ALTERATION OR ENLARGEMENT, OR ANY CHANGE WHATEVER.

For value received hereby sell, assign and transfer unto
16 shs - M. J. West
16 shs Charles P. West
13309 South Woodland Road, Shaker Heights, Cleveland, O. Shares
of the Capital Stock represented by the within Certificate
and do hereby irrevocably constitute and appoint
The Union Trust Company Attorney
to transfer the said stock on the books of the within named
Company with full power of substitution in the premises.

Dated 19

x Mrs. Grace C. West

OK In presence of
C. K. Shane

Trust Company

4 10 50

RE-ISSUED IN CERTIFICATE No. Co 4706-7

THIS SPACE MUST NOT BE COVERED IN ANY WAY

DEFENDANT'S EXHIBIT C (Sheet 2)

Case No. 5622
DEFENDANT'S EXHIBIT C

DEFENDANT'S EXHIBIT D.

Letter, April 4, 1934, to M. J. West from Defendant.

(Filed December 17, 1937.)

April 4, 1934.

Mr. M. J. West,
312 Engineers Building,
Cleveland, Ohio.

Dear Mr. West:

Your letter of March 28 addressed to this Company at Boston, Massachusetts, requesting information concerning shares of this Company's stock formerly registered in the name of (Mrs.) Grace C. West, has been referred to this office for reply.

Our books show that Grace C. West has not been a stockholder of record of this Company since November 4, 1929.

We are returning the certified copy of the Will and the affidavit which accompanied your letter.

Yours very truly,

WILLIAM J. STOUT,
Assistant Treasurer.

CDB:JHK
Enclosures (2)

DEFENDANT'S EXHIBIT E.

Copy of Inventory.

(Filed December 17, 1937.)

THE STATE OF OHIO,
CUYAHOGA COUNTY, SS.

To R. S. McIntosh, Merle J. Adams, G. W. Wernicke, Greeting:

You have this day been appointed by the Probate Court of said County to make an Inventory and Appraisement of the personal goods and chattels belonging to the

Estate of Charles P. West, late of the City of Cleveland Heights, in said County, deceased;

You are, therefore, authorized and required to well and truly appraise all the personal goods and chattels of the deceased, which shall be presented to you by the Executrix, and a true and accurate inventory thereof make, and the same appraise at the true value in money, and perform such other duties as are required by law of you in the premises as appraisers, and make and sign said inventory and appraisal so that the same may be returned to this office within thirty days from the date hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Probate Court, at Cleveland, this 15th day of April, 1926.

ALEXANDER HADDEN, *Probate Judge.*
By ARTHUR J. GOUDY, *Deputy Clerk.*

THE STATE OF OHIO,
CUYAHOGA COUNTY, ss.

We, the undersigned, do make solemn oath that we will truly, honestly and impartially appraise the estate and property that may be exhibited to us, belonging to the estate of Charles P. West, deceased, and perform such other duties as are required by law of us in the premises as appraisers, according to the best of our knowledge and ability.

R. S. MCINTOSH,
MERLE J. ADAMS,
G. W. WERNICKE.

Sworn to and Subscribed before me, this 20 day of April, 1926.

CHESTER H. ELLIOTT,
Notary Public.

Schedule A.

Personal Goods and Chattels, belonging to the Estate of the said Charles P. West deceased, which are assets, in the hands of the administrator, as shown to us.

Shares	Description of Property	Appraised Value
92	American Telephone & Telegraph Co.	13340
50	Cleveland Railway Co.	4784
25	" Electric Illuminating Co.	2600
15	Ohio Public Service 6%	1410
10	" " " 7%	1010
32	M. A. Hanna—preferred	1600
15	Butler Bros.	450
10	Superior Brick—Pref	300
10	" " Common	No Value
		25,494

Schedule B.

The following is a statement of all bonds, mortgages, notes and other securities belonging to said estate, and of all debts and accounts due and owing to it.

Name of Debtor	Description of Debt	Principal	Interest	Amount Due	Appraised Value
Wm. & G. W. Eelsasser	Note	300.00	6%	300.00	300.00
Geo. & Fern Behnke	Land Contract		6%	1298.92	1298.92
Dudley B. & Mary Newport	" "		"	680.86	1680.86
Rickie Carspie	" "		"	3181.86	3181.86
J. H. & Metta C. Giebe	" "		"	2507.72	2507.72
Jacob & Rose Scheuer	" "		"	6142.52	6142.52
J. & K. Mellick	" "		"	66.04	66.04
					15,177.92

Schedule C.

Amount of money in the hands of the ~~Administrator~~ **Executrix** or in bank, belonging to said estate:

Lorain St. Savings & Trust Co.	152.79
Society for Savings	117.38
Life Insurance	852.39
	1122.56

SCHEDULE D.

The said Charles P. West, deceased, leaving a widow, ~~widower, minor child~~ the following which we value at $400.00 are not deemed assets or administered as such.

1. Household goods, live stock, tools, implements and utensils. (Not exceeding $500.00 in value.)
2. All the wearing apparel, relics and heirlooms of the family and of the deceased, without appraisal, and ornaments, pictures and books not exceeding two hundred dollars in value.

SCHEDULE E.

The said decedent leaving a widow and no minor children under the age of fifteen years we do allow for her support of one year from the death of said decedent, the sum of Three Thousand Dollars.

We, the undersigned appraisers herein, hereby certify that the foregoing is a true and correct appraisement of the property exhibited to us.

R. S. McINTOSH,
MERLE J. ADAMS,
G. W. WERNICKE,
Appraisers.

THE STATE OF OHIO,
CUYAHOGA COUNTY, SS.

I, GRACE C. WEST, Executrix of the Estate of Charles P. West deceased, late of said county, being duly sworn, depose and say that the foregoing inventory is in all respects, just and true; that it contains a true statement of all the estate and property of the deceased which has come to my knowledge, and also all money, bank bills or other circulating medium belonging to the deceased; and also all just claims of the deceased against myself or other persons, according to the best of my knowledge.

GRACE C. WEST, E.

Sworn to and Subscribed before me, this 21st day of April, 1926.

ARTHUR J. GOUDY,
Deputy Clerk.

We, the undersigned sons and heirs at law of Charles P. West deceased, residing in Cuyahoga County, hereby waive notice of the taking of the Inventory and Appraisement of the estate and property of said decedent, and consent that the same may be made at any time.

M. J. West,
Charles Francis Peyton West.

The State of Ohio,
Cuyahoga County, ss.

Grace C. West, Executrix of the Estate of Charles P. West deceased, being duly sworn on her oath says that she gave notice of the taking of the within Inventory to all the persons required by law to be notified thereof, and also posted notice in two of the most public places in Cleveland Heights, where said decedent last resided.

Grace C. West.

Sworn to before me, and subscribed in my presence this 21st day of April, 1926.

Arthur J. Goudy,
Deputy Clerk.

DEFENDANT'S EXHIBIT F.

Copy of Petition filed in Common Pleas Court Case.

(Filed December 17, 1937.)

No. 408792.

IN THE COURT OF COMMON PLEAS.

STATE OF OHIO, CUYAHOGA COUNTY, SS.

CHARLES PEYTON WEST,
MAURICE JOHN WEST,
312 Engineers Building, Cleveland, Ohio,
Plaintiffs,

vs.

AMERICAN TELEPHONE & TELEGRAPH CO.,
750 Huron Road, Cleveland, Ohio,
Defendant.

PETITION.

Now comes Charles Peyton West and Maurice John West, plaintiffs herein, and say that American Telephone & Telegraph Company, defendant, is a corporation organized and existing under and by virtue of the laws of the State of New York and qualified to do business in the State of Ohio.

Plaintiffs say that they are the sons and only surviving children of Charles P. West, deceased; that said decedent died on the 21st day of March, 1926, leaving a Last Will and Testament, which later was admitted to probate in the Probate Court of Cuyahoga County, Ohio, in accordance with Docket No. 191, No. 154,617, by the terms of which said Charles P. West, deceased, gave, devised and bequeathed to his widow, Grace C. West, the use and income of all of his property for the period of her natural life; that after the death of his said wife, Grace C. West, said decedent directed that all of his said property be divided equally between the plaintiffs, share and share alike.

Plaintiffs further say that by said Will said Grace C. West was nominated Executrix and was, upon the death of the said decedent and the probating of said Will, named by the said Probate Court and qualified as Executrix of said Estate.

Plaintiffs say further that at the time of his decease the said Charles P. West was the owner of ninety-two (92) shares of the capital of The American Telephone & Telegraph Company, and that on or about January 14, 1927, without the knowledge of plaintiffs, said defendant American Telephone & Telegraph Company wrongfully, fraudulently and willfully caused, permitted and did themselves unlawfully transfer the certificate or certificates for said shares then in the name of said Charles P. West, deceased, to Grace C. West, without regard or reference to the limitations placed upon her estate in said shares, or the limitations contained in the Will of said decedent, or the interests of plaintiffs in said shares, although the defendant American Telephone & Telegraph Company well knew of the terms and conditions of said Will and of the limitations of the estate and respective interests of said Grace C. West and the plaintiffs herein in said shares and estate.

Plaintiffs say further that on or about November 4, 1929, without the knowledge or consent of the plaintiffs, the defendant wrongfully, fraudulently and willfully caused and permitted the sale and transfer of said certificate or certificates for said ninety-two (92) shares of capital of The American Telephone & Telegraph Company without regard to the rights of the plaintiffs therein, and without regard to the nature of the interest of Grace C. West in said shares, and wrongfully, fraudulently and willfully permitted and caused the sale and transfer of said shares to parties unknown to these plaintiffs, thereby greatly damaging these plaintiffs as they believe.

Plaintiffs say further that they had no knowledge of the wrongful acts of the defendant herein complained of prior to March, 1934.

Plaintiffs say further that the defendant was at all times informed as to the nature of the interests of said Grace C. West and of these plaintiffs in said shares of capital of American Telephone & Telegraph Company, and that as a direct and proximate result of defendant's wrongful, fraudulent and willful acts plaintiffs were damaged to the extent of Twenty-five Thousand Dollars ($25,000.00).

WHEREFORE plaintiffs pray judgment against the defendant in the sum of Twenty-five Thousand Dollars ($25,000.00) together with interest from November 4, 1929, and their costs herein.

(Signed) M. J. WEST,

(Signed) GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,

Attorneys for Plaintiffs.

(Duly Verified.)

PRECIPE.

To the Clerk:

Please issue summons, returnable according to law, for the defendant herein, American Telephone & Telegraph Company. Endorse same "Action for Money Only. Amount claimed $25,000.00, with interest from November 4, 1929."

(Signed) M. J. WEST,

(Signed) GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,

Attorneys for Plaintiffs.

DEFENDANT'S EXHIBIT G.

Copy of Amended Answer Filed in Common Pleas Court Case.

(Filed December 17, 1937.)

AMENDED ANSWER.

(Caption Same as on Petition in Defendant's Exhibit F.)

FIRST DEFENSE

Now comes American Telephone & Telegraph Company, defendant herein, leave of court having first been obtained to file this amended answer, and for its amended answer:

Admits that it is a corporation organized and existing under the laws of the State of New York and qualified to do business in the State of Ohio; admits that the plaintiffs are the sons and only surviving children of Charles P. West, deceased; and admits that said Charles P. West died March 21, 1926, leaving a last will and testament which was admitted to probate in the Probate Court of Cuyahoga County, Ohio, in accordance with docket No. 191, No. 154617.

Avers that by the terms of said last will and testament which is on file in the Probate Court of Cuyahoga County, Charles P. West devised and bequeathed to his widow, Grace C. West:

> "The use, income, rents and profits of all of my property of every kind and nature and wheresoever the same may be located, for and during her natural life, to use, enjoy and dispose of the same as she may deem best. I hereby give to my said wife authority, with the consent and advice of my two sons hereinafter named, without the intervention of the Probate Court, to convert any or all of my real estate or securities into money and to invest and re-invest the same and any other moneys I may have at the time of my decease as she and my said sons may determine."

Admits that said will provided that after the death of said Grace C. West all of the property should be divided equally between the plaintiffs, share and share alike; admits that by said will Grace C. West was nominated Executrix and thereafter qualified and acted as such; and admits that at the time of his death Charles P. West was the owner of 92 shares of the common capital stock of American Telephone & Telegraph Company.

Avers that on or about January 14, 1927, Grace C. West duly filed in the Probate Court of Cuyahoga County, Ohio, an application reciting that the debts of said estate had been paid; that there remained in her hands, among other stocks, 92 shares of the common stock of American Telephone & Telegraph Company; that all of said stocks were bequeathed to Grace C. West for and during her natural life and asking the Court to transfer said stocks to her; that the plaintiffs, Charles P. West and Maurice J. West, consented to such distribution in writing; that thereupon said Probate Court issued its order whereby it granted said application and authorized said Grace C. West to—

> "distribute in kind and transfer unto herself as the widow of said Charles P. West, Deceased, and the distributee entitled thereto, the aforesaid stocks, as prayed for.";

that the plaintiffs knew of and consented to the making of said order and to the disposition of said stock to said Grace C. West.

Avers that shortly thereafter Grace C. West tendered to the defendant certificates of stock for 92 shares of the common stock of the defendant, duly endorsed by her as Executrix of the estate of Charles P. West, deceased, re-

quested the issuance of a new certificate for said amount in the name of Grace C. West and submitted therewith a copy of the Will of Charles P. West, deceased, a copy of her letters of administration and a copy of said order of said Probate Court directing distribution to Grace C. West.

Thereupon this defendant issued a new certificate of said common stock in the name of said Grace C. West.

Defendant avers that nearly three years thereafter and on or about November 4, 1929, said certificate of stock for said 92 shares of the common stock of the defendant was submitted to the defendant by Paine, Webber & Co., brokers with offices at 25 Broad Street, New York City, with power of attorney attached duly executed by Grace C. West and assigning and transferring said stock to said Paine, Webber & Co.; that at that time the defendant had no notice or knowledge of the will of Charles P. West; that thereafter the defendant did transfer said stock in accordance with said assignment and in conformity with the Uniform Transfer Act of the State of New York.

The defendant further avers that Grace C. West is now living and that this action is prematurely brought.

The defendant denies each and several the averments of the plaintiffs' petition except those hereinbefore expressly admitted or otherwise averred.

SECOND DEFENSE

For its Second Defense defendant refers to and incorporates as though herein rewritten the admissions, averments and denials of its First Defense and says further:

The Will of said Charles P. West contained no provision for a trustee of his property and gave his widow, said Grace C. West, possession of all his property during her life without requiring her to furnish any bond. In such a case, unless objection is raised by the executor or remainderman, it has been the uniform and common practice of the Probate Court of Cuyahoga County to order distribution of all personal property to the life tenant without requiring bond and to direct that shares of stock be transferred to the name of the life tenant without making any reference to the remainder interest. This practice was uniform and notorious and well known to the plaintiffs.

Plaintiffs not only had notice of the Executrix's intention to make distribution in conformity with said practice, but plaintiffs also expressly consented in writing to such distribution whereby the certificate representing 92 shares of capital stock of defendant was transferred to the individual name of Grace C. West.

Plaintiffs made no request of the Probate Court at any time that said certificate be transferred in such form as to set forth the life tenancy of Grace C. West and plaintiffs made no application at any time to require the said Grace C. West to execute in their favor a refunding bond or other security for their protection in the event that said Grace C. West converted said stocks to her own use.

Defendant transferred said stock to Grace C. West in her individual name relying upon the order of said Probate Court directing said distribution, and upon the conduct of the plaintiffs as hereinbefore set forth, and in consequence thereof plaintiffs are now estopped to deny the legality and propriety of said transfer and are now estopped from making each and several the claims asserted by them in their petition.

THIRD DEFENSE

For its Third Defense defendant refers to and incorporates as though herein rewritten the admissions, averments and denials of its First Defense and Second Defense and says further:

Even if it should be held that defendant acted wrongfully in transferring shares of defendant on January 14, 1927 and on November 4, 1929, as alleged by plaintiff, plaintiff's cause of action accrued more than four years prior to the filing of plaintiff's petition and is now barred by the statute of limitations as provided by the General Code of Ohio.

WHEREFORE, the defendant having fully answered prays that it may go hence with its costs.

TOLLES, HOGSETT & GINN (signed)
WILLIAM B. COCKLEY (signed)
Attorneys for Defendant American Telephone & Telegraph Company.

(Duly Verified.)

DEFENDANT'S EXHIBIT H.

Copy of Reply to Amended Answer filed in Common Pleas Court Case.

(Filed December 17, 1937.)

REPLY TO AMENDED ANSWER.

(Caption Same as on Petition in Defendant's Exhibit F:)

Now come the plaintiffs, leave of court having first been duly obtained for filing instanter their reply herein to defendant's amended answer, and re-aver all of the allegations and averments of the petition as though herein fully set forth.

Plaintiffs admit that said Last Will and Testament of Charles P. West was on file in the Probate Court of Cuyahoga County, and that it contained provisions substantially as set forth in the first defense of said Amended Answer, and that the defendant did, in fact, have notice and knowledge of said will and the terms thereof as admitted in the third main paragraph, page 2, of said amended answer.

Further replying to said amended answer, plaintiffs deny each and every allegation therein contained, not herein expressly admitted to be true.

WHEREFORE having fully replied to defendant's answer, plaintiffs pray for judgment as heretofore requested in their petition.

(Signed) M. J. WEST,

(Signed) GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,

Attorneys for Plaintiffs.

(Duly Verified.)

DEFENDANT'S EXHIBIT I.

Stipulation of Counsel.

(Filed December 17, 1937.)

(Caption of this Case Omitted.)

It is hereby stipulated between counsel for the respective parties that the case of Charles Peyton West and Maurice John West, Plaintiffs, vs. American Telephone & Telegraph Company, Defendant, Cause No. 408,792 on the docket of the Common Pleas Court of Cuyahoga County, Ohio, was tried upon the merits and judgment was rendered in said Court in favor of the plaintiffs against the defendant. Said judgment was thereafter reviewed on error in the Court of Appeals of Cuyahoga County, Ohio, and judgment therein was rendered in accordance with the mandate of said Court of Appeals as the same appears on the docket of the Common Pleas Court of Cuyahoga County, Journal 280, page 2560. No opinion of the Court of Appeals was filed with the record of said cause, although copies of such an opinion were furnished by the Court to counsel of record. Thereafter the plaintiffs duly filed a motion in the Supreme Court of Ohio to require said Court of Appeals of Cuyahoga County to certify its record in said cause. The plaintiffs alleged in said motion that the Court of Appeals had reversed the judgment of the Common Pleas Court in favor of the appellants and entered "final judgment against the appellants (plaintiffs herein) and in favor of appellee (defendant herein)." The plaintiffs in said motion further alleged that there was "probable error" in the proceedings of said Court of Appeals. After hearing the Supreme Court of Ohio denied said motion to certify.

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,
Attorneys for Plaintiffs.

WILLIAM B. COCKLEY,
Attorney for Defendant.

DEFENDANT'S EXHIBIT J.

Mandate of State Court of Appeals.

(Filed December 17, 1937.)

Entry in Cuyahoga County Common Pleas Court Records, Journal 280, Page 2560

"Charles Payton West, et al. vs. American Telephone & Telegraph Co. } No. 408792 No. 15504—Law

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

On the 9th day of November, 1936 there was filed in this court a Mandate from the Court of Appeals, which is as follows, to-wit:

This cause came on to be heard upon the pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel; on consideration whereof, the Court certifies, that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the said Court of Common Pleas is reversed for reason stated in opinion on file and final judgment is hereby rendered for appellant, no other error appearing in the record, and this cause is remanded to said Court of Common Pleas.

It is therefore considered that said appellant recover of said Appellee its costs herein.

ORDERED, that a special mandate be sent to said Court of Common Pleas, to carry this judgment into execution. The appellee excepts.

I, John J. Busher, Clerk of our said Court of Appeals, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said court.

Witness, my hand and the seal of said Court, at Cleveland, this 9th day of November, A. D. 1936.

JOHN J. BUSHER, *Clerk*,

(Seal) By EDWARD T. MURRAY, *Deputy*.

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, CUYAHOGA COUNTY.

To the Honorable Court of Common Pleas in and for the County of Cuyahoga, Greeting:

You are Hereby Commanded, that, without delay, you cause the foregoing judgment of our said Court of Appeals to be carried into complete execution.

Witness, John J. Busher, Clerk of our said Court of Appeals, and the seal thereof, at Cleveland, this 9th day of November, A. D. 1936.

JOHN J. BUSHER, *Clerk,*
By EDWARD T. MURRAY, *Deputy.*
(Seal)

MEMORANDUM OPINION OF COURT.

(Filed March 17, 1938.)

WEST, *J.*

This is a suit in equity in which the plaintiffs' bill alleges that by the will of Charles P. West, ninety-two shares of stock in the defendant company were bequeathed to Grace C. West, his widow and executrix, for her life, with remainder to the plaintiffs. That thereafter, without their knowledge or consent, but with full knowledge of their rights as remaindermen, the defendant transferred this stock to the widow and delivered to her a certificate without qualification, upon the face of which she alone appeared as owner; that thereafter she assigned the stock to an innocent purchaser for value, and that plaintiffs first obtained knowledge of these transfers in 1934. That on June 18, 1937, after the conclusion of an action which they brought against the defendant to recover their loss, wherein judgment went for the defendant, the plaintiffs made demand on the defendant for restoration of the stock in question, with dividends and interest. And the plaintiffs in the instant case pray that defendant be ordered to issue and deliver to them a certificate for ninety-two shares and account for dividends paid since November 2, 1929 with interest, as well as for damages equalling the difference between the highest intermediate value and the value of the shares at date of demand, with interest; and that defendant be ordered to restore to them their rights in the stock, and the court declare the rights and obligations of the parties in the premises and for such further relief as justice and equity may require.

To this bill the defendant pleads as a bar the former adjudication in its favor in the state court; the statute of limitations; estoppel based on proceedings in the probate court of Cuyahoga County to effect distribution of said stock "in kind" to the widow; and plaintiffs' alleged consent to the transfer to her without limitation, with reliance thereon by defendant and its good faith in making the transfers in question; and also the laches of plaintiffs.

The former judgment relied on as *res judicata* was pronounced by the state court of appeals after reversing the judgment of the common pleas in plaintiffs' favor "for reasons stated in opinion on file" in which the judgment entry recites "final judgment is hereby rendered for appellant" (the defendant).

In my opinion this judgment, which the supreme court of Ohio refused to review, while final, does not bar the

present suit. In *Baltimore S. S. Co. v. Phillips,* 274 U. S. 317, 319, it is said:

> "The effect of a judgment or decree as *res judicata* depends upon whether the second action or suit is upon the same or a different cause of action."

And the former suit was not on the same cause of action as the present one. In the above case, at p. 321, after stating that a cause of action does not consist of facts but of the unlawful violation of a right which the facts show, it is stated:

> "The *thing,* therefore, which in contemplation of law as its *cause,* becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*"

The pleadings in the former case disclose that the facts alleged therein are not all the facts contained in this bill. No demand on defendant to restore the stock or plaintiffs' rights therein was set out. This omission was not due to carelessness of the pleader, for when the former action was filed, no demand had been made, and it was impossible to aver demand. Should it be claimed that this omission in the pleading does not necessarily negative a previous demand, the answer is that if demand had in fact been made, it is defendant's obligation to set up that fact and prove it in the present case in order to perfect its plea of *res judicata.*

It is clear that demand is required in such a case, and without it no cause of action is stated. *American Steel Foundries v. Hunt,* 79 F. (2d) 558, 561 (6 C. C. A.); *West v. American Tel. & Tel. Co.,* 54 Oh. Ap. 369. The former judgment, in the language of the Supreme Court in *Cromwell v. County of Sac,* 94 U. S. 351, 352—

> "is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

As no demand was made previous to the former action, evidence of such demand could not in that case have been offered. *Kelliher et al. v. Stone & Webster,* 75 F. (2d) 331, 332. At p. 333 it is said:

> "The test of identity usually laid down is whether the same evidence would suffice to sustain both."

The evidence in the former action, which we are justified in saying did not include any demand, would not sustain the present suit wherein demand is alleged. It being plain that a legal wrong arises from the facts alleged and proved in the present case, while in the former no such wrong was either alleged or proved, identity of causes of action necessary to a plea of *res judicata* is wanting. In deciding on this point it is not at all necessary to look to the opinion of the court of appeals; nor does the finality of the judgment of that court have any significance; the judgment merely concludes the parties from disputing that in the former case the plaintiffs did not establish a right to recover damages; it did not bar them from asserting a similar right or a claim in equity for restoration of the stock or their rights in it, in a subsequent suit on pleadings and proof such as we now have.

The suit is not barred by the statute of limitations, for plaintiffs' cause of action was not perfected before June, 1937, and their bill was filed less than a month later. *Railroad Co. v. Robbins, Admr.*, 35 O. S. 483; *Steverding v. Stove Co.*, 121 O. S. 250; *West v. Amer. Tel. & Tel. Co., supra.* While this court does not refer to the opinion in the last cited case to qualify the plain and unambiguous judgment on the merits formerly rendered in defendant's favor, it has the right to and does treat it as the latest Ohio authority on many of the questions involved herein. The court had before it a copy of the will and the widow's application for an order of distribution in kind on which plaintiffs' consent to the distribution was indorsed (Ex. 11), and was of opinion that plaintiffs were not estopped and had consented to nothing more than distribution of the stock in kind, evidently meaning that their consent extended to distribution to the widow of a life estate only, with remainder to them. There is now before this court a stipulation of the parties which contains the order of distribution (Ex. 12) in which the probate court found that the will bequeathed the stock to Grace C. West for and during her natural life; that she desired it distributed to herself in kind, and that the next of kin had consented in writing to such distribution. This order was made under G. C. 10839 (now 10509-181) and could not operate to determine who was entitled to distribution under the will or the character of estate bequeathed; nor, of course, to divest plaintiffs of their title. *Swearingen v. Morris,* 14 O. S. 424; *Armstrong v. Grandin,* 39 O. S. 368, 374.

There is also before this court oral testimony which may be assumed not to have been before the state court, and is also relied on to support the defenses of estoppel and

laches, principally because it is said to show lack of diligence by plaintiffs in prosecuting inquiries which would have disclosed the unlawful transfer. I find the evidence entirely insufficient to establish either of these defenses.

I also agree with the majority of the court of appeals holding that none of the illegal transfers accelerated the remainder. Plaintiffs evidently base their claim to back dividends on acceleration. If the first transfer to the widow, which took place by delivery of the certificate to her in Ohio, constituted a merger of the two estates, there was no acceleration under *Carpenter v. Denoon,* 29 O. S. 379. Counsel for plaintiffs now say that the question is controlled by the law of Massachusetts, where the transfer to the innocent purchaser from the widow took place; or possibly by the law of New York, where the last transfer occurred. To meet these contentions defendant cites statutes of both states which provide that a conveyance by a tenant for life or years purporting to grant a greater estate than he possesses does not work forfeiture of his estate, thus indicating that the law of those states is the same as in Ohio.

Whatever the applicable legal principle, in this suit in which plaintiffs are asking the aid of a court of equity, they are not, I think, entitled on any equitable principle to recover on account of dividends paid during the widow's life. Acceleration leading to that result would be equivalent to enforcing forfeiture of the life estate. And, "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." *Marshall v. Vicksburg,* 15 Wall. 146, 149.

The case principally relied upon by plaintiffs on this point is *Allen, Exec. v. Globe Ins. Co.,* 19 W. L. B. 198, decided by the Superior Court of Cincinnati and affirmed by the Ohio Supreme Court without report. The language of the Superior Court on which reliance is placed, is this:

> "As the company caused the transfer without due authority, it is bound to return to the present executor, the same or an equal amount of stock, or to pay the value of the same in money, and for the amount of the dividends declared since the wrongful transfer."

In its opinion in *West v. Amer. Tel. & Tel. Co., supra,* the court said that the *Allen* case did not involve the distinction between dividends accruing during and after the lifetime of the life tenant. Plaintiffs' counsel seem to dispute this, for they say that dividends declared during the life of the widow were required to be accounted for. The illegal transfer occurred in August, 1885, and the widow

died on January 12, 1886, about five months later. There is no indication that any dividends were declared during this short period, nor any justification for plaintiffs' view, as opposed to the statement of the court of appeals.

Several cases cited by plaintiffs, such as *Pollock v. National Bank,* 7 N. Y. 274, and *Telegraph Co. v. Davenport,* 97 U. S. 369, concern the right of an owner of stock who was entitled to dividends thereon at all times, to recover the same; and do not deal with the situation we have here, where, under the terms of the will, plaintiffs are remaindermen only, and entitled to nothing so long as the widow lives; and she is still living.

In its opinion in the former action the court of appeals stated its view of the plaintiffs' rights in the event they made demand, and I am satisfied with this.

Finding on the issues joined will be in favor of the plaintiffs, and the defendant will be ordered to procure by purchase or otherwise and issue its certificate for ninety-two shares of its stock of the same par value and character as that disposed of by said testator's will, to a Cleveland bank or trust company to be named in the decree, to hold in trust for the legatees under Item III of the will of Charles P. West, deceased, other than Grace C. West, for and during the life of Grace C. West, with remainder to such legatees other than Grace C. West, and to record the same on its appropriate books, said certificate to be safely kept by said trustee until the death of Grace C. West, during which time defendant will not be required to pay dividends thereon, and upon her death to be delivered over to such legatees, who shall thereafter have power to receive dividends and exercise all the rights of stockholders in said defendant corporation. And it will be further ordered that if defendant fails to comply with the foregoing requirement with sixty days of the entry of decree herein, plaintiffs shall be entitled, on application to this court, to have their damages resulting from such refusal and failure duly assessed and adjudged against the defendant. Costs herein, including compensation of trustee and expense of bond in amount to be fixed in the decree, are adjudged against the defendant; and the cause is continued for the purpose of fully effectuating this decree.

S. H. West,
Judge.

March 17, 1938.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW.

(Filed July 2, 1938.)

The Court finds the facts herein as follows:

1. Charles P. West, a resident of Cuyahoga County, Ohio, died testate on March 21, 1926, leaving surviving him a widow, Grace C. West, and two sons, the plaintiffs, Charles Peyton West and Maurice John West.

2. The material portions of the Last Will and Testament of Charles P. West are as follows:

> "Item II. I give, devise and bequeath to my beloved wife Grace C. West in lieu of her dower and a year's support, the use, income, rents and profits of all of my property of every kind and nature and wheresoever the same may be located, for and during her natural life, to use, enjoy and dispose of the same as she may deem best.
>
> "I hereby give to my said wife authority with the consent and advice of my two sons hereinafter named, without the intervention of the Probate Court to convert any or all of my real estate or securities into money and to invest and reinvest the same and any other money I may have at the time of my decease in such manner as she and my said sons may determine.
>
> "Item III. And after the decease of my said wife I direct that all of my said property be divided equally between my two sons, Charles Peyton West and Maurice John West, share and share alike or their heirs *per stirpes,* or in case of the death of either without leaving lawful heirs of his body then all of said property shall go to the survivor of them."

The widow, Grace C. West, was appointed and served as executrix without bond. She is still living and at the present time is about sixty-six years of age.

3. On January 14, 1927 Grace C. West, as executrix, filed application in the Probate Court of Cuyahoga County for distribution to herself in kind of various securities in the estate, including 92 shares of common stock of the defendant. The plaintiffs consented in writing to this application and the Probate Court entered an order which after reciting "all of said stocks are bequeathed to Grace C. West, his widow, for and during her natural lifetime," directed the executrix to "distribute in kind and transfer unto herself as the widow of Charles P. West, deceased, and the distributee entitled thereto, the aforesaid stocks as prayed for."

4. On or about February 2, 1927, there were delivered to the defendant at its transfer office in New York, certificates for 92 shares of common stock of the defendant duly endorsed by Grace C. West as executrix of the estate. Accompanying these certificates were certified copies (1) of her appointment as executrix; (2) of the Last Will and Testament of Charles P. West; (3) of her application for distribution in kind with consent of plaintiffs attached; and (4) of the journal entry of the Probate Court directing distribution to her. On receipt of these documents the defendant issued and delivered to Grace C. West by mail a new certificate in her name for said 92 shares of common stock, without noting thereon any limitation on her estate therein.

5. On or about October 31, 1929 Grace C. West, then living near Boston, Massachusetts, without the consent and advice of plaintiffs, delivered said certificate for 92 shares to the Boston office of Paine, Webber & Co., brokers, as collateral for her individual account there. Attached to the certificate was an assignment and power of attorney to transfer, duly executed by Grace C. West. The Boston office of Paine, Webber & Co. forwarded the certificate to its New York office and on November 2, 1929, Paine, Webber & Co. delivered the certificate, together with the assignment and power of attorney, to the defendant at its transfer office in New York City and on November 4, 1929 the defendant issued a new certificate for 92 shares to or upon the order of Paine, Webber & Co. Paine, Webber & Co. continued to hold this certificate at New York City as collateral for Grace C. West's account until September 24, 1930, at which time it sold the stock on the New York Exchange and applied the proceeds to Grace C. West's individual account. Neither Paine, Webber & Co. nor the subsequent purchaser from it knew of any limitation upon the right of Grace C. West to sell said shares.

6. Plaintiff, Charles P. West, born in 1896, is a business man in Pittsburgh, Pennsylvania. The plaintiff, Maurice J. West, born in 1898, has been a practicing lawyer of the Cleveland, Ohio, Bar, since September 1, 1927. Neither of the plaintiffs between January 14, 1927, and March 19, 1934, made any investigation of the records of the Probate Court of Cuyahoga County, Ohio, or any inquiry, either of the defendant or of Grace C. West, concerning the method in which said common shares of the defendant were transferred to her name or whether she continued to hold the certificate therefor, but in 1930 did make inquiry of the Cleveland Electric Illuminating Company,

twenty-five shares of whose stock were assets of the estate of Charles P. West, and found such stock properly issued to "Grace C. West, life tenant of the estate of Charles P. West, deceased."

7. On June 2, 1934, the plaintiffs filed a petition in the Common Pleas Court of Cuyahoga County, Ohio, against the defendant based substantially on the facts hereinbefore set forth, seeking damages for wrongful transfer of said ninety-two shares. After answer was filed by the defendant, the cause was tried on the merits and judgment was rendered by the Common Pleas Court in favor of the plaintiffs against the defendant. This judgment was reversed by the Court of Appeals of Cuyahoga County and final judgment entered in favor of the defendant on the ground that the plaintiffs had made no demand upon the defendant to restore to them their remainder interest in said shares of stock. A motion to certify was overruled by the Supreme Court of Ohio, in February, 1937.

8. On June 18, 1937, the plaintiffs, by letter, made demand upon the defendant and its attorney for the delivery to the plaintiffs of said 92 shares of stock together with an accounting for the dividends paid thereon in the meantime and for other sums. This demand the defendant refused.

From the foregoing findings of fact the Court makes the following conclusions of law:

1. The judgment of the Court of Appeals in the former suit, while final, does not support the defense of *res judicata* pleaded by the defendant in this case. No cause of action arose in this case until the plaintiffs made a demand upon the defendant and such demand was refused. In the present suit, demand by the plaintiffs and its refusal by the defendant are alleged and proved. At the time the former suit was brought no demand had been made and none was alleged or proved, and the cause of action was not identical with this one.

2. This suit is not barred by the statute of limitations. The plaintiffs' cause of action accrued upon refusal of said demand in June, 1937. The plaintiffs' bill was filed within a month thereafter.

3. The plaintiffs' consent to the order of distribution in kind did not authorize the defendant to transfer the shares of stock to the name of Grace C. West without limitation.

4. The order of the Probate Court directing distribution to Grace C. West was made under General Code Section 10839 (new Section 10509-181) and could not operate to determine who was entitled to distribution under the Will or the character of the estate bequeathed; nor could it divest the plaintiffs of their title to said stock.

5. The evidence in the case does not support the defendant's claim of estoppel and laches on the part of the plaintiffs.

6. Neither the improper transfer on the part of Grace C. West nor on the part of the defendant operated to terminate the life estate or to accelerate the plaintiffs' remainder in said stock.

7. The plaintiffs are not entitled to any back dividends or to any dividends or other rights to which Grace C. West, but for her transfer, would have been entitled during her life. Acceleration leading to such result would be equivalent to enforcing the forfeiture of a life estate.

8. The plaintiffs are entitled to have 92 shares of the defendant's common stock of the same par value and character as that disposed of by the Will of Charles P. West held by a Trustee in the name of such trustee under the control of this Court, during the life of the widow, Grace C. West, and upon her death are entitled to have said stock distributed as provided in Item III of the Will of Charles P. West; and during the lifetime of Grace C. West the defendant shall have all the rights in said stock that Grace C. West would have, had she not transferred the same, and the plaintiffs shall have all the rights in said stock to which they are entitled as remaindermen under said will. All parties except.

S. H. WEST,
Judge.

Approved as to form.

WILLIAM B. COCKLEY,
Attorney for Defendant.

GARFIELD, CROSS, DAOUST, BALDWIN AND VROOMAN,
AND
H. L. DEIBEL,
Attorneys for Plaintiffs.

FINAL DECREE.

(Filed July 2, 1938.)

This cause came on for hearing upon the Stipulation of Facts, the testimony, the argument and the briefs of counsel for the parties, and upon consideration thereof the Court finds for the plaintiffs in accordance with its separate findings of fact and conclusions of law filed herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED—

1. That The Cleveland Trust Company be and hereby is appointed trustee for the purposes of this decree, to give bond in the sum of $2500.00 to be approved by this Court; that the defendant within sixty (60) days after the entry of this decree, shall procure by purchase or otherwise and issue to The Cleveland Trust Company of Cleveland, Ohio, as Trustee pursuant to decree of United States District Court in Equity Cause No. 5622, its certificate or certificates for 92 shares of the common stock of American Telephone and Telegraph Company and the defendant shall record the same on its appropriate books.

2. That said Trustee shall faithfully hold and keep said certificates during the life of Grace C. West and upon her death the Trustee shall make distribution of said 92 shares (including all rights inuring to plaintiffs as remaindermen) in accordance with Item III of the Will of Charles P. West as follows:

> "And after the decease of my said wife I direct all of my said property be divided equally between my two sons, Charles Peyton West and Maurice John West, share and share alike or their heirs *per stirpes* or in case of the death of either without leaving lawful heirs of his body then all of said property shall go to the survivor of them."

3. That during the life of Grace C. West defendant shall be entitled to all the rights, issues and benefits in and from said stock which were bequeathed to said Grace C. West by the Will of Charles P. West, including the right to dividends, the right to vote said stock and any other rights of a life tenant thereof, and the trustee shall give proxies and make distributions to the defendant accordingly.

4. That the costs of this action, the compensation of the Trustee, premiums of trustee's bonds, and all taxes and charges of every kind or character assessed against said stock while it is so held in trust shall be and hereby are adjudged against the defendant; and

5. That this cause is continued for the purpose of assessing plaintiffs' damages in event defendant fails or refuses to deliver said certificate or certificates of stock in trust as directed, and for the exercise of supervision over said trust until its termination, as future events and circumstances may require. All parties except.

S. H. WEST,
Judge.

Approved as to form:

WILLIAM B. COCKLEY,
Attorney for American Telephone and Telegraph Company.

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,
Attorneys for Charles Peyton West and Maurice John West.

REPORT AS TO COMPLIANCE WITH DECREE ENTERED JULY 2, 1938.

(Filed August 30, 1938.)

Now comes defendant, American Telephone and Telegraph Company, and reports to the Court as follows:

1. Within 60 days after the entry of this Court's decree herein the defendant procured and issued to "The Cleveland Trust Company of Cleveland, Ohio, as Trustee pursuant to decree of United States District Court in Equity Cause No. 5622" certificate numbered A248246 representing 92 shares of the common stock of the defendant, recorded such issuance on its appropriate books and on August 26, 1938 delivered said certificate to The Cleveland Trust Company as trustee for the purposes of said decree.

2. On August 26, 1938 the defendant paid The Cleveland Trust Company in full its compensation for its services as such trustee.

TOLLES, HOGSETT & GINN,
WILLIAM B. COCKLEY,
Attorneys for defendant, American Telephone and Telegraph Company.

(Duly Verified.)

Proof of Service.

We acknowledge receipt this August 30, 1938 of a copy of the foregoing report.

GARFIELD, CROSS, DAOUST, BALDWIN & VROOMAN,
H. L. DEIBEL,
Attorneys for Plaintiffs, Charles Peyton West and Maurice John West.

PLAINTIFFS' NOTICE OF APPEAL.

(Filed September 26, 1938.)

Notice is hereby given that Charles Peyton West and Maurice John West, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Sixth Circuit from the order and decree entered herein on July 2, 1938.

C. M. VROOMAN,
1401 Midland Building,
HARRY L. DEIBEL,
Standard Building,
Attorneys for Appellants.

PLAINTIFFS' BOND ON APPEAL.

(Filed September 26, 1938.)

KNOW ALL MEN BY THESE PRESENTS, that we, Charles Peyton West and Maurice John West, Appellants in the above cause, as principals, and American Surety Company of New York, as surety, are held and firmly bound unto American Telephone & Telegraph Company, Appellee in the above cause, in the full and just sum of Two Hundred and Fifty Dollars ($250.00) to be paid to said obligee, its successors or assigns; to which payment well and truly to be made we bind ourselves, our executors, administrators and assigns, jointly and severally, by these presents.

Signed and dated at Cleveland, Ohio, this 23rd day of September, 1938.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That

WHEREAS, lately at a session of the District Court of the United States for the Northern District of Ohio, Eastern Division, in a suit pending in said Court wherein Charles Peyton West and Maurice John West were plaintiffs and American Telephone & Telegraph Company was defendant, being Cause No. 5622 in Equity on the docket of said Court, a certain decree was rendered therein on July 2, 1938 and the said plaintiffs having filed their Notice of Appeal from said decree to the United States Circuit Court of Appeals for the Sixth Circuit;

Now, if said Appellants shall prosecute said appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and effect.

CHARLES PEYTON WEST,
MAURICE JOHN WEST,
PRINCIPALS.

AMERICAN SURETY COMPANY OF NEW YORK,
By G. A. HURLBUTT,
Resident Vice President,
And D. M. HERBERT,
Resident Ass't Secretary,
SURETY.

DEFENDANT'S NOTICE OF APPEAL.

(Filed September 29, 1938.)

Notice is hereby given that American Telephone and Telegraph Company, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the decree entered in this action on July 2, 1938.

Signed: WILLIAM B. COCKLEY,
Attorney for Appellant,
American Telephone and
Telegraph Company.
Address: 1759 Union Commerce Building,
Cleveland, Ohio.

DEFENDANT'S BOND ON APPEAL.

(Filed September 29, 1938.)

KNOW ALL MEN BY THESE PRESENTS, that we, American Telephone and Telegraph Company, as Principal, and National Surety Corporation, as Surety, are held and firmly bound unto Charles Peyton West and Maurice John West in the amount of $250, to be paid to said Charles Peyton West and Maurice John West, their attorneys, heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

SEALED with our seals and dated this ..... day of October, 1938.

WHEREAS, lately, at a regular term of the District Court of the United States for the Northern District of Ohio, Eastern Division, in a suit pending in said court between Charles Peyton West and Maurice John West, Plaintiffs, and American Telephone and Telegraph Company, Defendant, a decree was rendered against said defendant

at the costs of defendant, and said defendant having filed its notice of appeal in said court to reverse the decree in the aforesaid suit, now the condition of the above obligation is that if said defendant shall pay costs assessed against it if its appeal be dismissed or the decree be affirmed or modified, then the above obligation to be void; otherwise to remain in full force and effect.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
By WILLIAM B. COCKLEY,
Attorney-in-Fact,
PRINCIPAL.

NATIONAL SURETY CORPORATION, (Seal)
By W. J. COUGHLIN,
Attorney-in-Fact,
SURETY.

STIPULATION RE CONTENTS OF RECORD ON APPEAL.

(Filed October 3, 1938.)

The above parties by their respective counsel hereby stipulate that the following portions of the record, proceedings and evidence in the Trial Court shall be included in the record on appeal:

(1) Bill of Complaint;
(2) Answer;
(3) Reply;
(4) Transcript of testimony, including plaintiffs' Exhibits 1 to 3, inclusive, and defendant's Exhibits A to J, inclusive;
(5) Memorandum opinion of Court;
(6) Findings of fact and conclusions of law;
(7) Final decree of July 2, 1938;

(8) Report as to compliance with decree;
(9) Plaintiffs' Notice of Appeal;
(10) Plaintiffs' Bond on Appeal;
(11) Defendant's Notice of Appeal;
(12) Defendant's Bond on Appeal;
(13) Stipulation re contents of record on appeal;
(14) Stipulation re certification of record;
(15) Certificate of Clerk.

All of the foregoing papers shall be delivered to The Gates Legal Publishing Company for printing.

C. M. VROOMAN,
1401 Midland Building,

H. L. DEIBEL,
Standard Building,
Attorneys for Plaintiffs.

WILLIAM B. COCKLEY,
1759 Union Commerce Bldg.,
Cleveland, Ohio,
Attorney for Defendant.

Copy served 10/3/38.

STIPULATION RE CERTIFICATION OF RECORD.

(Filed October 3, 1938.)

In accordance with Section 6 of Rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law, the Federal Rules of Civil Procedure, and the rules of the Appellate Court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this case as set forth in the stipulation re contents of record on appeal without further comparison by the clerk.

C. M. VROOMAN,
1401 Midland Building,
Cleveland, Ohio,

H. L. DEIBEL,
Standard Building,
Cleveland, Ohio,
Attorneys for Plaintiffs.

WILLIAM B. COCKLEY,
1759 Union Commerce Building,
Cleveland, Ohio,
Attorney for Defendant.

Copy served 10/3/38.

CERTIFICATE OF CLERK.

NORTHERN DISTRICT OF OHIO, ss.:

I, C. B. WATKINS, Clerk of the United States District Court within and for said district, hereby certify that the foregoing printed pages contain a full, true and complete copy of the record in this cause, in accordance with the stipulated designation for record on appeal filed herein.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland, in said district, this .... day of November, A. D. 1938.

C. B. WATKINS, *Clerk,*
By K. V. WILSON,
Chief Deputy.

(Seal)

PROCEEDINGS IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSES ARGUED AND SUBMITTED

(October 6, 1939—Before: SIMONS, ALLEN and HAMILTON, JJ.)

These causes are argued by Harry L. Deibel for Charles Peyton West, et al, and by William B. Cockley for American Telephone and Telegraph Company and are submitted to the court.

ORDER—No. 8140

(Entered November 16, 1939)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be and the same is hereby dismissed.

DECREE—No. 8141

(Entered November 16, 1939)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed and the case remanded for further proceedings in accordance with the opinion of this court.

OPINION

(Filed November 16, 1939)

Before SIMONS, ALLEN and HAMILTON, Circuit Judges.

ALLEN, Circuit Judge. Charles Peyton West and Maurice John West, as plaintiffs, filed a bill in equity praying that the American Telephone and Telegraph Company, defendant, be compelled to restore plaintiffs' right as remaindermen in certain shares of stock in the defendant corporation. The District Court entered a decree for the plaintiffs, but refused to order payment of dividends accruing since November 2, 1929, the date of the alleged unlawful assignment and sale of the stock. As appeals were prosecuted by both parties, they will be denominated as plaintiffs and defendant respectively in this opinion.

The facts are in the main stipulated, and there is no material controversy in the evidence the two plaintiffs being the only witnesses. Charles P. West, father of the plaintiffs, died in 1926 in Cleveland, Ohio, leaving to his widow, Grace C. West, who was also executrix, a life estate in his property, and the remainder to the plaintiffs. The widow (who was both aunt and stepmother of the plaintiffs) applied as executrix to the probate court for distribution in kind of stocks of the estate, including 92 shares of stock in the defendant corporation, and the plaintiffs in writing consented to such distribution. The probate court issued an order of distribution, and a copy of this order and the application therefor, together with a certified copy of the will and letters testamentary, were presented to the defendant, which on February 2, 1927, transferred the 92 shares to Grace C. West, without in any manner indicating her limited ownership. In October, 1929, Grace C. West delivered the stock to Paine, Webber & Company, brokers in Boston, Massachusetts, as collateral for her individual account with them, together with an assignment and power of attorney to transfer. On November 4, 1929, the defendant issued a new certificate for the shares to Paine, Webber & Company.

Plaintiff Maurice John West, at that time a practicing attorney, was informed in 1930 that his stepmother had suffered great losses in the stock market, and that some of the estate securities "were gone." He demanded that his stepmother show him the certificates, and she refused. While he investigated the status of certain other stock in which his stepmother had a life interest, the remainder belonging to him and his brother, he made no further investigation with reference to the stock of the defendant company until 1934. He then wrote to the defendant and learned of the transfer to Paine, Webber & Company. Plaintiff Charles Peyton West made no investigation whatever at any time.

Suit at law for damages was instituted in the Common Pleas Court of Cuyahoga County, Ohio, on June 2, 1934. The plaintiffs were successful in the trial court, but the Court of Appeals of Cuyahoga County reversed the judg-

ment of the trial court and rendered final judgment for defendant. Motion to certify the record in the Supreme Court of Ohio was denied. The present bill in equity was then filed in the District Court on July 14, 1937.

The defendant in its appeal (No. 8141) contends that it is not liable for the transfer of the stock because the plaintiffs consented to the distribution in kind, and that the action is barred by the Ohio statute of limitations, by laches, and by the judgment of the Court of Appeals of Cuyahoga County.

As to the first point, the defendant urges that it is not liable, upon the ground that the transfer of stock to Grace C. West without limitation was authorized by the plaintiffs. We do not agree with this contention. The defendant, having been presented with a certified copy of the will and the application for and order of distribution, had notice that Grace C. West was not entitled to receive a stock certificate indicating that she had an unlimited ownership in these shares. Each of these papers showed that Grace C. West was a life tenant only, and the will showed that plaintiffs were entitled to the remainder interest. The defendant is liable for negligence committed by its agents when the stock was transferred without limitation to Grace C. West, in February, 1927. *St. Romes* v. *Levee Steam Cotton Press Co.*, 127 U. S. 614; *American Steel Foundries* v. *Hunt*, 79 Fed. (2d) 558 (C. C. A. 6); *Loring* v. *Salisbury Mills*, 125 Mass. 138, 150.

Defendant further urges that the action is barred by the statute of limitations. In the case in the state court no demand and refusal was alleged, and the Court of Appeals reversed the judgment of the trial court upon that ground. The present case alleges and proves demand and refusal, and the District Court held that the cause of action arose at the date of the refusal of the demand in June, 1937, and that as the equity case was filed July 14, 1937, the cause of action was therefore not outlawed.

We think the District Court erred in holding that demand and refusal were necessary to the accrual of the cause of action. These plaintiffs as remaindermen have

no immediate right to possession of the certificates. When the wrongful transfer was made, they were entitled to sue the defendant immediately for damages for the destruction of their remainder interest without any demand. *Lowry* v. *Commercial & Farmers' Bank,* Fed. Cas. 8581, p. 1050; *Coffey* v. *Wilkerson,* 58 Ky. 101; *Yeager* v. *Bank of Kentucky,* 127 Ky. 751. The District Court relied upon and misconstrued the decision of this court in *American Steel Foundries* v. *Hunt,* supra, in holding that demand was necessary. In that case the action was brought by the owner of the stock certificate against a company which had issued a new certificate for the same shares. The shares had not been issued in the name of the owner, and the holder of record had represented that the certificate had been lost. The owner sued for damages for conversion without presenting his own certificate and demanding that the corporation issue one in his name. This the court held he could not do, upon the ground that as to the rightful owner the issue of new stock was void and wholly ineffective unaccompanied by any affirmative act, such as a denial of the owner's right to receive dividends, vote, or participate in distribution of the corporate assets. *Pure Oil Co.* v. *Hunt,* 46 Ohio App. 329; *Stewerding* v. *Cleveland Co-Operative Stove Co.,* 121 Ohio St. 250, and *Cleveland and Mahoning Rd. Co.* v. *Robbins,* 35 Ohio St. 483, are not authority for the proposition that demand and refusal are necessary in a suit by a remainderman arising out of a transfer of stock in violation of his rights. All of these cases adjudicate controversies which involve the rights of the present owner of the stock, and not of remaindermen.

The only Ohio case squarely on this subject is *West* v. *American Telephone & Telegraph Co.,* 7. O. O. 363, which is the decision of the Court of Appeals reversing the judgment of the trial court in favor of plaintiffs herein, in the state case. In that decision it was held that demand was necessary before the cause of action accrued, but that case also relied upon and misconstrued *American Steel Foundries* v. *Hunt,* supra.

It is an interesting question whether, under *Erie Rd. Co.* v. *Tompkins,* 304 U. S. 64, the federal courts are bound by judgments of inferior state courts. The judgment in the state case was rendered by the Court of Appeals of Cuyahoga County. While it, of course, has persuasive force, it is not binding on the courts of appeals for the other 87 counties of Ohio. A motion to certify was made in the Supreme Court of Ohio, and overruled. This may well have been because that court did not deem the case to be of great general and public interest. Ohio Constitution, Art. IV, Sec. 2. The settled rule in Ohio is that the Supreme Court, by denial of motion to certify the record, lays down no law. It not infrequently makes pronouncements counter to those of circuit courts of appeals whose judgments it has refused to certify, on the same questions covered by those judgments. *Village of Brewster* v. *Hill,* 128 Ohio St. 343, 353.

In *Erie Rd. Co.* v. *Tompkins,* supra, the Supreme Court stated that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." The reason why state courts other than the highest court were not included in this ruling is obvious, and well illustrated in the present case. A judgment of a court of appeals for one county in the State of Ohio does not make state law, and the denial of motion to certify that case by the Supreme Court does not make state law. It is the declaration of the highest court of the state which crystallizes the law of state judicial decisions and is binding upon the federal courts. If the judgment of the state court of appeals is binding here, we have the anomalous situation of an intermediate appellate court in Ohio misconstruing a decision of this court (*American Steel Foundries* v. *Hunt,* supra), and a District Court upon authority of the inferior appellate court's misconstruction, making the same error, and this court following the same erroneous holding. This conclusion hardly seems logical, and we hold

that *West* v. *American Telephone & Telegraph Co.*, supra, is not controlling here.

Our decision that demand was not necessary inevitably results in the conclusion that the cause of action arose when the stock was wrongfully transferred in 1927 to Grace C. West. The delay in instituting suit is fatal under the applicable Ohio statute, Section 11,224, General Code of Ohio, the pertinent portions of which read as follows:

> "An action for either of the following causes, shall be brought within four years after the cause thereof accrued: . . .
>
> "2. For the recovery of personal property, or for taking or detaining it; . . .
>
> "4. For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated.
>
> "If the action be . . . for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered. . . ."

Plaintiffs claim that this is an action for the recovery of personal property or for taking or detaining it, and that the cause did not accrue until the wrongdoer was discovered. If paragraph 2 were the controlling provision, the saving clause would not aid the plaintiffs here, for the principal wrongdoer might easily have been discovered in 1930, when Maurice John West was informed that some of the estate stocks had been sold, and under the statute notice sufficient to put the claimant upon inquiry is equivalent to discovery. 19 Ohio Jur. p. 462. But paragraph 2 is not applicable. The remaindermen have no right of possession so long as the life estate exists. The injury which they have suffered is an injury to their right of remainder. The applicable provision is paragraph 4, "For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated," which carries with it no saving clause, and the action is barred under the statute.

If this cause of action dates from demand and refusal without any limitation, under plaintiffs' construction and

under the construction of the District Court the remaindermen have it in their power indefinitely to postpone the accrual of the action by postponing demand, and thus to nullify the statute of limitations. But this is not the law. Where a condition precedent to a cause of action exists, such as demand and refusal, the cause of action does not accrue until the condition has been performed. We have held that no such condition precedent exists here, and that the action accrued at the time of the tortious transfer of the stock. But assuming that demand and refusal are necessary to the accrual of this action, it is the law that when some preliminary action is a prerequisite to the bringing of the suit, and such action rests with the claimant to perform, he cannot defeat the operation of the statute by failure to act or by long and unnecessary delay. Otherwise he would have it in his power to defeat the purpose of the statute. *Atchison, Topeka & Santa Fe Rd. Co.* v. *Burlingame Tp.*, 36 Kan. 628; *Palmer* v. *Palmer*, 36 Mich. 487; *Oleson* v. *Wilson*, 20 Mont. 544; *Winchester & Lexington Turnpike Co.* v. *Wickliffe's Admr.*, 100 Ky. 531; *Barnes* v. *Glide*, 117 Cal. 1. Cf. *Bauserman* v. *Blunt*, 147 U. S. 647; *United States* v. *Sligh*, 24 Fed. (2d) 636. This is also the law in Ohio (*Keithler* v. *Foster*, 22 Ohio St. 27). The demand under such circumstances is not to be delayed beyond the period of the statute, which in this case is four years.

This rule is peculiarly applicable where, as here, the plaintiffs have filed a bill in equity. No demand was made upon the defendant until 1934, some seven years after the conversion. It does not appear that any action has been taken against the principal tort feasor, the life tenant. By this lapse of time the defendant may well have lost its power to protect itself by action against the life tenant. Whatever be the view, then, as to the necessity of demand, the delay of the plaintiffs bars their action.

Laches also exists and is fatal to recovery. A material consideration in this connection is the fact that the action is brought not against the life tenant, the principal tort feasor, but against the defendant, whose wrongdoing

constitutes mere negligence, no concealment or fraud being charged. The family relationship might perhaps account for delay in making demand if the action were against the life tenant herself. But this relationship also suggests strong possibility of collusion, and does not excuse delay as to this defendant. Maurice John West's knowledge in 1930 that some of these stocks had been sold called for action. If inquiry had then been made, the defendant might have been able to enforce its remedy against the life tenant. Laches is not measured by the statute of limitations (*Alsop* v. *Riker*, 155 U. S. 448). But here the delay is longer than the period of the statute, and compels the conclusion that the plaintiffs failed within a reasonable time to assert their rights. Cf. *Liverpool & London & Globe Ins. Co.* v. *Crosby*, 83 Fed. (2d) 647 (C. C. A. 6).

As plaintiffs' bill was not timely filed, it is unnecessary to consider the question of res judicata, also relied upon by defendant. Neither need we discuss the points as to acceleration and damages, upon which plaintiffs rely in their appeal. Since plaintiffs are not entitled to recover, it would be futile to define the amount and measure of their recovery.

Appeal No. 8140 is dismissed. In appeal No. 8141 the decree is reversed and the case is remanded for further proceedings in accordance with the opinion.

Judge Simons concurs in the result insofar as it denies recovery owing to laches in the demand and prosecution of the claim.

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ORDER DENYING PETITION FOR REHEARING

(Entered January 11, 1940)

The petition for rehearing is denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of *Charles Peyton West, et al,* v. *The American Telephone & Telegraph Co.*, No. 8140, and *The American Telephone & Telegraph Co.* v. *Charles Peyton West, et al,* No. 8141, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 30th day of March, A. D., 1940.

(SEAL)

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 44

ORDER ALLOWING CERTIORARI—Filed May 6, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is assigned for argument immediately following No. 815, Fidelity Union Trust Co. et al. vs. Field.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 45

ORDER ALLOWING CERTIORARI—Filed May 6, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted and the case is assigned for argument immediately following No. 888, West vs. American Telephone and Telegraph Co.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted]44

No. [redacted]45

CHARLES PEYTON WEST and
MAURICE JOHN WEST,
Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit, and
BRIEF OF PETITIONERS.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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CHARLES PEYTON WEST and
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Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH CO.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Charles Peyton West and Maurice John West, respectfully pray for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decision rendered November 16, 1939, reversing a decree of the United States District Court for the Northern District of Ohio, Eastern Division. *West v. American Telephone and Telegraph Co.* (1939), 108 Fed. (2d) 347 (C. C. A. 6th Circuit; Op. 135, 136 of Record). A petition for rehearing filed by your petitioners on December 15, 1939 (R. 147), was denied by the Circuit Court of Appeals on January 11, 1940. (R. 161.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The *primary question* presented by the decision of the Circuit Court of Appeals is whether the federal courts are bound by the decisions of the Court of Appeals of Ohio, whose jurisdiction is final in nearly all cases, but which is not the highest court in the state, and does not possess state-wide jurisdiction.

The question arises from protracted litigation over the loss of corporate stock.

On June 2, 1934, petitioners filed their petition in the Court of Common Pleas of Cuyahoga County, a *nisi prius* court of general jurisdiction, against respondent to recover money damages for loss of the stock in question, which loss was proximately caused by wrongful transfer of the stock by respondent; in this stock petitioners had a vested remainder interest. Upon trial, that Court rendered judgment in favor of petitioners for the value of the stock as of the time of the loss. Respondent appealed to the Court of Appeals of Ohio, the next court in the Ohio judicial hierarchy, which Court on November 9, 1936, reversed the judgment of the Court of Common Pleas, and rendered final judgment for respondent on the express ground that the action was prematurely brought, in that a demand for the return of the stock was not alleged in the petition, and "until such demand is made, no cause of action exists against the corporation." 54 Ohio Appellate 369, 7 N. E. (2d) 805, 7 Ohio Opinions 363. (R. 71.) The journal entry and mandate of the state Court of Appeals refer to its written opinion in the case for its reasons for the judgment. (R. 114.)

A motion to certify the record was filed by petitioners in the Supreme Court of Ohio and was overruled by the latter court on January 20, 1937. (54 Ohio Appellate XLIII.)

In compliance with the decision of the Court of Appeals, petitioners, on June 18, 1937, made demand on respondent for the restoration of the lost shares and mesne dividends, which demand was refused, and they thereupon filed an equity suit in the District Court, Northern District of Ohio, Eastern Division, for restoration of the stock and mesne dividends and for further relief. In he federal case the parties and the allegations of operative facts are the same as in the state court, except that the petition in the federal case contains the additional facts of demand made and refusal of the demand.

The District Court, like the state Court of Appeals, held a demand was necessary; but the Circuit Court of Appeals on appeal concluded it was not necessary, and expressly declared it was not bound by the decision of the Ohio Court of Appeals which held it was necessary; this is the decision of the Circuit Court of Appeals which petitioners ask this Honorable Court to review.

The *second question* is whether the decision of the Ohio Court of Appeals is *res judicata* on the question of demand and therefore binding on all courts, not only as a closed issue, but also because that decision created the vested right to make the demand.

A *third* is whether the conceded facts show laches on the part of the petitioners, as a matter of law.

The *fourth question* concerns the essential nature of the action.

And the *fifth* has to do with acceleration of remainders.

An understanding of these questions requires a further brief statement of the evidentiary facts, all of which are conceded:

Petitioners' father died in 1926, a resident of Cleveland, and by will bequeathed his securities, including ninety-two shares of respondent's stock, to his widow for life with a

vested remainder in petitioners. The widow was petitioners' stepmother, and also their real mother's sister.

Upon distribution of the estate in 1927, respondent, having in its possession a duly certified copy of the will, issued a new certificate for the shares, in the widow's name, but without showing on the certificate her limited interest or the remainder in the stock. The widow took possession of the certificate as life tenant, and on October 31, 1929, at the beginning of the Depression, sold the stock at the City of Boston, to Payne, Webber and Company, her stockbroker, an innocent purchaser for value, which presented the certificate for registration on respondent's books at New York, and respondent discarded the West certificate and issued a new certificate in the broker's name on November 4, 1929.

Petitioners at that time had no knowledge of the form of the certificate issued to their stepmother, nor were they at any time informed of the sale by the life tenant or by respondent. The stepmother removed to Boston after the decease of her husband and resided with a sister. One of the petitioners, Maurice John West, visited his aunts at Boston in 1930, and during this visit the stepmother's sister remarked to Mr. West that the stepmother had suffered losses in the stock market, and she (the informant) thought some of the estate securities might be gone. Maurice John West thereupon demanded of Mrs. West, his stepmother, that she show him the estate stock certificates, which she refused to do. (R. 30.)

Presently returning to Cleveland, Mr. West promptly repaired to the offices of the Cleveland Electric Illuminating Company, some of whose stock was also in the estate, and found the certificates of that stock properly evidenced the life estate. (R. 32.)

Mr. West was abashed by this finding, and concluded the suspicions must be wholly false. (R. 32.)

But early in 1934, Maurice John West heard further suspicions and wrote a letter of inquiry to the respondent,

and in respondent's reply for the first time learned that the life tenant had in fact disposed of respondent's stock, and it was transferred to a third person on November 4, 1929. Shortly after this the suit was filed in the state *nisi prius* court without having first made a demand. And, as stated, the trial court allowed full recovery, and the state Court of Appeals on appeal reversed the judgment and rendered final judgment for the respondent on the ground that the petition, failing to allege demand and its refusal, was fatally defective. The stepmother is not a party defendant although she is still in full life, and no question is raised as to defect of parties.

Petitioners claim their rights in the vested remainder were accelerated, the same as if the life tenant had died, by the sale, and by the transfer of the stock on November 4, 1929, and their rights as against respondent, for loss of the stock are to be determined as of November 4, 1929.

Respondent denies acceleration of the remainder, and claims the action is barred by the Ohio statute of limitations, and by laches.

The Federal District Court overruled all defenses, but refused acceleration of the remainder, and, since the life tenant is still living, ordered the equivalent of the lost shares to be trusteed until her decease, and the dividends on these shares to be retained by or paid to respondent until the decease of the life tenant.

The petitioners and respondent appealed from the District Court to the Circuit Court of Appeals under separate appeals numbers, namely, Nos. 8140, 8141. But both appeals deal with the same case and one record was filed for both appeals. The Circuit Court of Appeals, entertaining the view, as above shown, that demand was not necessary, and that the decision of the state Court of Appeals was not binding on it, held that the action is barred by the statute of limitations; and held, further, that the action is barred by laches.

GROUNDS FOR GRANTING THE WRIT.

The writ of certiorari is accordingly sought on the grounds—

First, that the federal courts are obliged to follow the law of Ohio, as declared by its Courts on the question of demand, which the Circuit Court of Appeals failed to do. This ground involves two aspects—That the Court of Appeals of Ohio is a court of such dignity that its decisions bind the federal courts; and, also, that the Circuit Court of Appeals misconceived the decisions of the Supreme Court of Ohio on the question of demand in other cases.

Secondly, that the decision of the state Court of Appeals that demand is necessary, is *res judicata* on that issue; and that it also created a vested right in petitioners whereof they were deprived by the decision of the Circuit Court of Appeals.

Third, that the Circuit Court of Appeals failed to follow the law, as declared by the Supreme Court of Ohio, on the doctrine of laches.

Fourth, that the Circuit Court of Appeals erroneously assumed the action was *ex delicto,* and applied the statute of limitations governing tort actions, whereas the action is *ex contractu* and other statutes apply.

And *Fifth,* that by the sale and wrongful transfer of the stock, the acceleration of their rights in remainder was precipitated, and respondent, which is responsible for the sale and transfer, must answer to petitioners for the loss of the stock as if the life tenant had died and they therefore had by her death become absolute owners.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and transmit to this Honorable Court a full and complete transcript of the record of said cause numbered and titled on its docket as:

"Charles Peyton West and Maurice John West, Appellants, v. The American Telephone and Telegraph Company, Appellee. Plaintiffs' Appeal No. 8140; Defendant's Appeal No. 8141," and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners be granted such other and further relief as they may be entitled to under the facts and law.

Respectfully submitted,

ORLIN F. GOUDY,
HARRY L. DEIBEL,
Attorneys for Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. .....

No. .....

CHARLES PEYTON WEST and
MAURICE JOHN WEST,
Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH CO.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS.

The opinion of the Circuit Court of Appeals is reported in 108 Fed. (2d) 347; also on page 136 of the Record.

The opinion of the federal District Court was not reported, but is found in full at p. 116 of the Record. The findings of fact and conclusions of law of the District Court are given in full on p. 121 of the Record.

And the opinion of the Ohio Court of Appeals is reported in 54 Ohio Appellate 369, 7 Ohio Opinions 363, 7 N. E. (2d) 805. (R. 71.)

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code as amended. (28 U. S. C. A. Sec. 347.)

The judgment of the Circuit Court of Appeals was entered on November 16, 1939 (R. 135, 136) and the petition for rehearing was denied on January 11, 1940. (R. 161.)

ARGUMENT.

The facts have been pleaded in the foregoing petition for the writ, and are not here repeated.

I. The Federal Circuit Court of Appeals Should Have Followed the Ruling of the State Court of Appeals on the Issue of Demand.

The Constitution of Ohio provides in part in Article IV, Sec. 6:

> "The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and to review, affirm, modify, or reverse the judgments of the court of common pleas, * * * and other courts of record within the district * * * and judgments of courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States, or of this state, * * * and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court. * * * and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

The jurisdiction of the Ohio Court of Appeals is fixed by this constitutional provision, and no statute can enlarge or abridge it. *State v. Wallace* (1923), 107 O. S. 557, 140 N. E. 305.

It is a court of such dignity that its decisions are final, with the exceptions enumerated. In the vast majority of cases, it is in fact the court of last resort in the state, and should therefore fall within the scope of the rule announced in *Erie Railroad v. Tompkins* (1938), 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487.

Assuming it were only an intermediate court, still, until the highest court has spoken, its pronouncements are to be followed by the federal courts. *Ruhlin v. N. Y. Life Ins. Co.* (1938), 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860; *Blair v. Commissioner* (1937), 300 U. S. 5, 81 L. Ed. 465, 57 S. Ct. 330; *Erie R. R. Co. v. Hilt* (1918), 247 U. S. 97, 62 L. Ed. 1003, 38 S. Ct. 435; *Hack v. American Surety Co.* (1938), 96 Fed. (2d) 939, at 946 (C. C. A. 7th).

However, it is clear that the Ohio Supreme Court has spoken, and shareholders are required to make demand before suit in that state where they pray for recognition as owners of stock and ask for dividends, as petitioners did in the bill in the District Court. *Steverding v. Cleveland Cooperative Stove Co.* (1929), 121 O. S. 250, 167 N. E. 883; *Railway Co. v. Robbins* (1880), 35 O. S. 483.

The instant case vividly demonstrates the travesty flowing from a rule which would give the federal courts free reign: The state Court of Appeals held no cause of action accrued until a demand was made, and entered judgment against the plaintiffs for that reason. The federal Court of Appeals held the cause of action accrued at the original transfer to the life tenant in 1927 (R. 141), without a demand, and entered judgment against the plaintiffs for that reason. The parties are crushed between the upper and nether millstones.

II. The Holding of the State Court of Appeals on the Issue of Demand is Res Judicata and Therefore is Binding on All Courts, and the Right of Action Created by the Decision is a Vested Right Securely Citadelled as Against the Federal Courts by the Due Process Clause of the Fifth Amendment to the Federal Constitution.

Whether right or wrong the decision of the state Court of Appeals that a demand is prerequisite to a right of action, is final and conclusive. Even if it were true that the federal courts are not required to follow the law as promul-

gated in *other* cases by inferior state courts, they must necessarily follow the final adjudications of the state courts on the self-same issue between the self-same parties. *Freeman on Judgments* (5th Ed.), Sections 708, 709, 739, 1467; *Deposit Bank v. Frankfort* (1903), 191 U. S. 499, at 510, 48 L. Ed. 276, 24 S. Ct. 154; *Mitchell v. First National Bank of Chicago* (1901), 180 U. S. 471, at 481, 45 L. Ed. 627, 21 S. Ct. 418; *Southern Pacific Railroad v. United States* (1897), 168 U. S. 1, at 48, 42 L. Ed. 355.

This point is completely ignored by the Circuit Court of Appeals.

Not only is a final judgment on an issue *res judicata* estopping the parties from relitigating that issue, but also the rights created or recognized by the judgment are vested rights immune from attack or impairment anywhere and everywhere. *Merchants of Danville v. Ballou* (1899), 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306, 81 Am. St. Rep. 715.

III. The Law of Laches as Laid Down by the Supreme Court of Ohio Was Misconceived by the Circuit Court of Appeals.

That law is that lapse of time is not enough to constitute the defense of laches, as indicated by the Circuit Court of Appeals, but, in addition, plaintiffs must have actually known of the cause of action, and the defendant must have changed his position to his prejudice. No evidence of prejudice was offered. *Russell v. Fourth National Bank* (1921), 102 O. S. 248, 131 N. E. 726; *Harris v. Wallace Mfg. Co.* (1911), 84 O. S. 104, 95 N. E. 559; *Crist v. Dice* (1869), 18 O. S. 536.

Admittedly, where demand is prerequisite to a cause of action, plaintiff may be barred by excessive dilatoriness in making that demand.

But the Circuit Court of Appeals cites *Keithler v. Foster* (1871), 22 O. S. 27, as holding that demand is required to be made within the period of that statute of limita-

tions which prescribes the interval within which the respective action is to be filed after the cause of action accrues. But plainly that is not what the case holds. The court thus summarizes its views in that case in the second syllabus:

> "Such demand, however, must be made in a reasonable time, and, if no cause for delay is shown, should be made at least within the time limited by the statute for bringing the action; and, in the absence of special circumstances, if no demand be shown within that time, it will be presumed to have been made at the expiration of that period, so far as regards the statute of limitations."

The rule therefore is "a reasonable time," and what "a reasonable time" may be, depends on the circumstances of each case. *Keithler v. Foster, supra,* at p. 31.

Obviously, in the instant case, the lapse of time from and after the filing of the suit in the state court on June 2, 1934, cannot be counted. Maurice John West heard a suspicion in 1930, that some of the stocks were gone. He investigated one of the other stocks and found that properly issued. Is a court of equity to require more than that under the circumstances? Respondent is itself necessarily charged with notice of the wrongful transfer, and of the destruction of petitioners' property, because it had a copy of the will which created their rights. But it did not communicate to the petitioners the fact known to it of the loss of their property, of which fact petitioners were wholly ignorant.

The Circuit Court of Appeals expresses the view that especially in equity was it the duty of petitioners to make demand before it was made. For the court observes, in its opinion (R. 142), referring to the duty to make demand within the period of the statute of limitations after the first wrongful transfer in 1927:

> "This rule is peculiarly applicable where, as here, the plaintiffs have filed a bill in equity."

Where, indeed, are the equities in this case?

Is not the exact converse of the view of the Circuit Court the only sound equity? If the Circuit Court is right in its view, then the respondent is to be blessed for its own wrong by a court of equity—an utterly impossible position.

IV. The Action is Ex Contractu and is Not Barred by Any Statute of Limitations.

The Circuit Court of Appeals tacitly proceeds on the assumption that the action sounds in tort, and therefore applies Section 11224, General Code of Ohio. (R. 141.) However, according to the best authorities it is an *ex contractu* action. *Fletcher on Corporations* (Perm. Ed.), Section 5538; *Travis v. Knox Terpezone Co.* (1915), 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 542, Ann. Cas. 1917A, 387. Actions for breach of oral contracts must be filed within six years after the cause of action accrued, and of written, within fifteen years. Sections 11221 and 11222 General Code of Ohio. The cause of action could not have accrued until the loss in 1929. *Marbury v. Ehlen* (1890), 72 Md. 206; *Baker v. Atlantic Coast Line Railroad Company* (1917), 173 N. C. 365. And upon failure otherwise than on the merits in 1936 at the hands of the state Court of Appeals, petitioners had one year within which to file a new case under favor of Section 11233 General Code of Ohio. They did in fact file the action in the federal District Court within nine months of such failure. Therefore, even if no demand was necessary and if the action is *ex contractu*, it is not barred by any statute of limitations.

V. The Unauthorized Sale of the Stock by the Life Tenant Terminated Her Life Estate, and Accelerated All Rights In, and Accruing From, the Stock to the Remaindermen as of the Time of the Sale. And the Sale, Having Been Made Possible, by Wrongful Acts of Respondent, Is to be Laid at Respondent's Door, as of the Time it Recognized the Sale, Discarded the West Certificate and Issued a New Certificate to a Third Person.

Since the tortious sale was in Massachusetts, the legal consequences of it flow from the law of that state. *Dennick v. Railway Co.* (1880), 103 U. S. 11, 26 S. Ct. 439.

By the law of Massachusetts a sale by a life tenant of personalty wherein the life estate exists, accelerates the remainder. *Leonard v. Stickney* (1881), 131 Mass. 541, at 545; *Phillips v. Allen* (1863), 89 Mass. 115.

Where the subject-matter of the life estate is stock and the corporation issues its stock certificate to the life tenant with knowledge of the remainder, but without evidencing it on the certificate, and the life tenant tortiously sells it, the corporation "is as fully liable as if it had shared in the profits of the transaction." Chief Justice Taney in *Lowry v. Bank* (1848), Taney's Opinions, 310 Fed. Cases, No. 8,581. See, also, *Western Union Telegraph Co. v. Davenport* (1878), 97 U. S. 369, 24 L. Ed. 1047; *Moores v. Bank* (1884), 111 U. S. 156, 28 L. Ed. 385; *St. Romes v. Levee Steam Cotton Press Co.* (1887), 127 U. S. 614, see Syllabus 3; *Loring v. Salisbury Mills* (1878), 125 Mass. 138, at 150.

SUMMARY.

The decision of the state Court of Appeals that demand is prerequisite to suit, is to be regarded as final and conclusive for these reasons: The federal courts are obliged to follow the law of the states; the state Court of Appeals declares the law of the state; in such cases demand is required by the Ohio Supreme Court; and the ruling is *res*

judicata, creating a vested right. In holding demand unnecessary, the Circuit Court of Appeals committed error.

No laches can be charged against petitioners. Laches is an equitable defense and cannot be relied on in Ohio unless the respondent was prejudiced by the delay. To say that respondent was prejudiced in the case at bar is to heap rewards on its own wrong. The Circuit Court of Appeals misconceived the state law on this point.

The action is *ex contractu* and is not barred by the Ohio statutes of limitation.

Not only are petitioners entitled to have the lost stock restored as remaindermen, but are to be treated as the absolute owners of it as of the time of the sale, and respondent is answerable as of the time it issued a new certificate to a third person with knowledge of petitioners' rights in remainder, but in disregard of such rights. Under the law the sale by the life tenant accelerated the remainder, of which law respondent is charged with full knowledge.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 44.

No. 45.

CHARLES PEYTON WEST and
MAURICE JOHN WEST,
Petitioners,

vs.

AMERICAN TELEPHONE and
TELEGRAPH COMPANY,
Respondent.

BRIEF OF PETITIONERS IN CERTIORARI.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

SUBJECT INDEX.

terest or the vested remainder of the petitioners. This occurred in February, 1927. On October 31, 1929, Grace C. West sold the stock, as respondent had thus enabled it to do. It was sold to an innocent purchaser for value. The certificate was duly delivered to respondent, and cancelled by it and a new certificate was issued to the purchaser. Of these facts petitioners had no knowledge until April, 1934. On June 2, 1934, they filed suit in the state court and recovered damages representing the value of the stock as of the time of the cancellation of the certificate in 1929. On appeal to the state Court of Appeals, that court reversed the Common Pleas Court on the express and sole ground that the record did not show demand and refusal. Demand was thereupon made on June 18, 1937, and, upon refusal of the demand, the instant suit was filed in the federal court on July 14, 1937 20

2. No statute of limitations begins to run where demand is necessary until it has been made and refused 22

3. But if demand were necessary, the action would not be barred by any statute and the Circuit Court of Appeals erred in holding it was barred. It is not barred because no cause of action for loss of stock could arise until November 4, 1929. The action is *ex contractu* and the very earliest date that it could be barred is November 4, 1935, but the suit was filed in June the previous year 22

4. The Circuit Court of Appeals erred in holding the action was *ex delicto* 23

5. Again, in actions for wrongful transfers, no statute of limitations runs until the stockholder has notice of the wrongful transfer. This is the rule declared by the Supreme Court of Ohio 25

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BRIEF OF PETITIONERS IN CERTIORARI.

A. STATEMENT OF CASE.

HISTORY OF THIS SUIT.

1. This suit is by remaindermen (petitioners here) of ninety-two (92) shares of stock against the corporation (respondent here) which issued it, for, (*a*) restoration of the stock, (*b*) to recover mesne dividends thereon, and (*c*) to recover damages for the difference in the value of the stock as of the time the remaindermen aver they were entitled to the stock and its lower value at the time of trial.

The suit was filed in the Federal District Court for the Northern District of Ohio, Eastern Division.

The District Court restored the stock, but held the remaindermen were not entitled to use and possession *in praesenti,* and accordingly denied mesne dividends, and damages, and trusteed the stock for the life of the life tenant. Both plaintiffs and defendant appealed from the District Court to the Circuit Court of Appeals for the Sixth Circuit (Nos. 8140, 8141).

The Circuit Court of Appeals held the remaindermen were barred from any recovery by Laches and by an Ohio Statute of Limitations, and accordingly dismissed the remaindermen's appeal, and reversed the decree. (R. 135, 141, 142.) This Court granted *certiorari* and the case is now for review.

THE STATE CASE.

2. But this was not the first litigation between these parties.

These petitioners first filed an action against this respondent in Cuyahoga County, Ohio, in the common pleas court, which is a court of original and general jurisdiction in that state. The state action was filed on June 2, 1934; and the record of the state case is substantially the same as the record in this case.

It may be stated at the outset, by way of explanation, that the petitioners in this Court were plaintiffs in the federal district court, and were appellants in the federal Circuit Court of Appeals; and respondent here was also appellant in the Circuit Court of Appeals. In the state court of common pleas these petitioners were plaintiffs, and respondent was defendant; and in the state court of appeals the respondent here was appellant, and these petitioners were appellees.

The material facts are as follows:

Charles P. West, plaintiffs' (petitioners here) father, a resident of Cleveland, Ohio, died March 21, 1926, leaving a will, which was duly admitted to probate by the probate court of Cuyahoga County, Ohio, at Cleveland, bequeathing a life use in his entire estate to his widow, Grace C. West, and a vested remainder to the plaintiffs, his sons, and naming the widow as executrix. Out of an abundance of caution the *testator expressly provided in his will* that the life tenant had authority to convert the assets in which

she had a life use, *only* "with the consent and advice of my two sons." (R. 65, Ex. 10.) The widow was duly appointed executrix and administered the estate. And on January 14, 1927, the executrix filed an application (R. 66, Ex. 11) in the probate court pursuant to Section 10509-181 of the General Code of Ohio for that court's approval of distribution in kind of the stocks held in the estate for distribution, alleging in the application, "all said stocks are bequeathed to her for and during her natural life."

That statute requires the distributees to consent to distribution of assets in kind, in lieu of having them converted into cash, and accordingly the plaintiffs in that case (these petitioners) signed the following consent:

> "We, the undersigned, Charles P. West, Jr., and Maurice J. West, hereby consent to the foregoing distribution in kind." (R. 67.)

The probate court, in the distribution proceeding, in its journal entry approving distribution in kind, found as follows:

> "The Court further finds that by virtue of the terms of the last will and testament of the said Charles P. West, deceased, all of said stocks are bequeathed to Grace C. West, his widow, for and during her natural lifetime, and that she is desirous of having the said stocks distributed unto herself in kind. The Court further finds that all of the next of kin of said decédent have duly consented in writing to such distribution." (R. 68.)

Two weeks after the distribution proceeding, to wit, on February 2, 1927, the executrix delivered to defendant company (respondent here) at its transfer office in New York City, eight stock certificates representing the ninety-two shares of defendant's stock in West's estate, endorsed by her as executrix. With the eight stock certificates, she also at the same time delivered to defendant true copies, duly certified by the probate court, of the following papers:

(1) Her letters testamentary;

(2) The probated will of Charles P. West;

(3) The application for authority to distribute in kind; and

(4) The order approving distribution in kind.

Upon the simultaneous receipt of all these documents, defendant's agents, though they had possession of these documents and were charged with full knowledge of their contents, issued a new certificate for the ninety-two shares in the name of Grace C. West, *without* evidencing on the certificate her limited interest, or plaintiffs' remainder (R. 69, Ex. 13), thus enabling the widow to dispose of the stock without the consent of the remaindermen.

Plaintiffs had no knowledge of the form of the new certificate of stock at the time of its issuance, and were not asked for, and of course did not give, consent to defendant to issue the certificate to the widow in the form above shown. (R. 22, 36.)

Meanwhile, Grace C. West changed her residence from Cleveland, Ohio, to Boston, Massachusetts. While residing at Boston, on October 31, 1929, at the beginning of the depression, she did sell the ninety-two shares to the firm of Paine, Webber & Co., her stockbroker, and a bona fide purchaser for value, and assigned and delivered the certificate (R. 69, Ex. 13) to the purchaser at its Boston office, with executed power of attorney to transfer it to the purchaser. The Boston office of the purchaser transmitted the certificate, together with the assignment of Grace C. West, and the power of attorney, to its main office in New York City, whence it was delivered to defendant's office at New York City, for transfer to the purchaser's name; and defendant thereupon on November 4, 1929, cancelled the certificate in Mrs. West's name, and issued to her purchaser a new certificate for the ninety-two shares.

Grace C. West is not the mother of petitioners, but is a sister of their mother who died years ago. That is, she

is plaintiffs' aunt and stepmother; she and plaintiffs' father were married after their mother's death. It was after the stepmother and widow had completed the administration of her husband's estate at Cleveland, that she moved to Boston; there she resided with a sister, Mrs. Helen Spitler. About June 10, 1930, Maurice John West, one of the plaintiffs, visited the aunts at Boston, and Mrs. Spitler then communicated to him in the course of conversation, her suspicion, "that Grace had suffered great losses in the stock market, and she thought some of our securities were gone * * *." (R. 30.) West then spoke to his stepmother about the securities and asked her to let him see the certificates, and she refused to do so. (R. 35.) Nothing was said to West then or at any other time to warrant the belief that she no longer possessed the certificates.

However, shortly after this, Mr. West returned to Cleveland which was his place of residence; he did not doubt the integrity of his stepmother, but thought it was the part of discretion to reassure himself of the error of Mrs. Spitler's suspicions, and went to the office of the Cleveland Electric Illuminating Company, some of whose stock was also in his father's estate, and inquired in what form the certificate was which it had issued to Grace C. West, and found it intact and in proper form:

> "Grace C. West, life tenant of the estate of Charles P. West, deceased."

Since the very same documents were furnished to each company at the time of transfer out of the estate in 1927, West necessarily inferred that the larger company had issued its certificates in proper form, since the smaller company had, and that the telephone stock must be intact, and felt embarrassed about further pursuing the inquiry on mere suspicion, into the conduct of his stepmother and aunt. And, after some additional inquiry, he dropped the subject. (R. 32.)

However, he heard further rumors early in 1934, and on April 4 of that year he wrote a letter of inquiry to defendant company, which thereupon informed him by letter that Grace C. West had ceased to be a stockholder on November 4, 1929. (R. 101, Defts'. Ex. D.)

The state suit was filed promptly after this correspondence.

Mrs. West has not at any time been a party to the litigation between these parties, and she is at this time in full life and between sixty-five and seventy years of age. (R. 121.)

It was stipulated by the parties that the value of defendant's stock was as follows at the next given dates:

October 31, 1929,	245.75;
November 4, 1929,	239.4;
April 4, 1930,	274.25; and
At the time of trial,	146⅓.

Dividends of $9 per share per annum have uniformly been paid at all times with which this litigation is concerned.

The common pleas court rendered judgment for the value of the stock as of the time of the defendant's cancellation of the West certificate on November 4, 1929, with interest.

The defendant thereupon appealed from the court of common pleas to the state court of appeals; the latter court on November 9, 1936, reversed the court of common pleas, and entered judgment for defendant; but the journal entry, and the mandate to the common pleas court, recite the following:

> "* * * the judgment of the said Court of Common Pleas is reversed for reasons stated in opinion on file and final judgment is hereby rendered for appellant * * *." (R. 11, 114.)

The opinion of the state court of appeals, as well as the aforesaid facts, is made part of the record in this Court

(R. 79), and is also reported as *West v. American Telephone and Telegraph Co.* (1936) 54 Ohio App. 369, 7 N. E. (2nd) 805, 7 Ohio Opinions 363.

The petition in the state common pleas court did not allege, and the evidence adduced there did not show, that plaintiffs had made demand on defendant for recognition of their rights in the shares in question.

And the sole and only ground for reversal given by the state court of appeals in its opinion, is that plaintiffs had no cause of action unless and until they had made demand on the corporation for recognition of their interests, and the demand had been refused. In the syllabus of the case which was written by the court, it is said:

> "* * * until such demand is made, no cause of action exists against the corporation." (R. 71.)

This view is also expressed on the last three pages of the opinion. (R. 78.)

In conformity to the Ohio practice the plaintiffs then filed a motion in the Supreme Court of Ohio asking that court to order the court of appeals to certify the record of the case. The Supreme Court overruled the motion on January 20, 1937.

THE RECORD IN THE INSTANT SUIT.

3. Then, on June 18, 1937, as required by the state court of appeals, plaintiffs made demand on defendant corporation for recognition and restoration of their rights. The demand was promptly refused, and the instant suit was thereupon filed on July 14, 1937, in the federal district at Cleveland, as aforesaid. The suit was filed in the federal court because of *diversity of citizenship.* As above stated, it is a suit in chancery for restoration of the destroyed shares, for dividends on the shares since November 4, 1929, and interest thereon; for damages represent-

ing the difference in the value of the stock with interest, and for such further relief as justice and equity require.

With this one exception that the federal petition necessarily alleges demand and refusal, and that the evidence in that court proves demand and refusal, the pleadings and the evidence in the federal court are the same as in the state court.

The federal district judge wrote a memorandum of opinion (R. 116-120) which was not published, and also made findings of fact and separate conclusions of law. (R. 120-124.)

As stated above, the district court held the plaintiffs were entitled to restoration of the stock; but that their remainder was not accelerated, and they should merely be put in the position they would be occupying if the life tenant had not sold the stock. The defendant was accordingly ordered to trustee ninety-two shares of its stock until the death of the life tenant.

From this decision both the plaintiffs and the defendant appealed to the Circuit Court of Appeals. That court held, (a) that demand was not necessary, (b) that the federal courts were not bound to follow the decision of the state court of appeals on demand, and (c) that the action was barred by laches and by the statute of limitations. (R. 136.)

The opinion is reported as *West v. American Telephone and Telegraph Co.* (1939) 108 Fed. (2d) 347 (C. C. A. 6th, 1939).

The opinion of the Circuit Court of Appeals is further discussed below under different heads.

B. ARGUMENT.

I. THE FIRST PROPOSITION THESE APPELLANTS DESIRE TO URGE, IS, THAT THE DECISION OF THE STATE COURT OF APPEALS ON THE ISSUE OF DEMAND IS RES JUDICATA.

Plaintiffs' petition was dismissed by the state court of appeals. Why? For one reason and one reason only—because the record did not show demand on defendant and its refusal. (R. 71.) That is the *ratio decidendi* of the case. The court declares in its opinion (R. 78) that defendant is liable, but no recovery is possible because the record does not show demand and refusal. The court would have allowed recovery but for the absence of this indispensable factor.

That is the one issue determined by that court—demand is prerequisite to suit. Judgment was rendered for defendant for this reason. It is in effect a ruling on general demurrer: It was held the petition does not state facts which show a cause of action because demand is not alleged; and the evidence does not establish a cause of action because the evidence does not prove a demand.

Therefore, however erroneous, or correct, this issue is finally decided as between these parties.

Blair v. Commissioner of Int. Rev. (1937) 300 U. S. 5, 57 S. Ct. 330, 81 L. Ed. 465;

De Sollar v. Hanscome (1895) 158 U. S. 216, 15 S. Ct. 816, 39 L. Ed. 956.

The issue actually adjudicated is a procedural point, but a decision on an issue of adjective law is as much *res judicata* as a decision on a point of substantive law.

2 *Freeman on Judgments* (5th Ed.) Sec. 745, p. 1567.

The judgment of the court necessarily and essentially decides only this issue, and that alone is therefore *res judicata.*

North Carolina R. Co. v. Story (1925) 268 U. S. 288, 45 S. Ct. 531, 69 L. Ed. 959, syllabus 2.

A decision by a state court is not only *res judicata* in state courts but is also *res judicata* in the federal courts.

Blair v. Commissioners of Int. Rev., supra;

Mitchell v. Bank (1901) 180 U. S. 471, 12 S. Ct. 418, 45 L. Ed. 627;

3 *Freeman on Judgments* (5th Ed.) Sec. 1465, p. 3009.

II. THE DECISION OF THE STATE COURT OF APPEALS ON DEMAND CREATES A RIGHT WHICH IS PROTECTED BY THE FIFTH AMENDMENT.

A right created or recognized by the decision of a state court is a vested right which cannot be impaired by subsequent decisions by the federal courts.

Muhlker v. N. Y. and Harlem R. Co. (1904) 197 U. S. 544, 25 S. Ct. 522, 49 L. Ed. 872.

The right to assert an action is a vested right which cannot be destroyed or abridged by any governmental agency.

16 *C. J. S.* Sec. 254, p. 675.

A statute of limitations can curtail the time within which to sue on existing causes of action, but no right of action can be entirely extinguished by over-limiting the period within which suit may be filed.

Smith v. Railway Co. (1930) 122 O. S. 45, 170 N. E. 637;

Wheeler v. Jackson (1890) 137 U. S. 245, 11 S. Ct. 76, 34 L. Ed. 659.

The adjudication of the state court of appeals recognized petitioners' right to make a demand, and upon refusal, the right to assert their cause of action would be mature. The right to make a demand accrued to them by the decision—a right *in praesenti,* which was therefore

vested. Being a vested right by the final determination of a court, no other court might later hold that right did not exist.

III. EVEN IF THE ISSUE OF DEMAND IN THIS CASE WERE NOT FINALLY DECIDED AND WERE NOT RES JUDICATA, EVEN IF THE DECISION OF THE STATE COURT DID NOT CONFER A VESTED RIGHT, NEVERTHELESS THE CIRCUIT COURT OF APPEALS COMMITTED ERROR IN HOLDING DEMAND WAS UNNECESSARY, BECAUSE THE LAW OF OHIO REQUIRES DEMAND, AND THE FEDERAL COURTS ARE BOUND BY THE LAW OF A STATE IN DIVERSITY OF CITIZENSHIP CASES.

1. It would be supererogation to discuss at length the case of *Erie R. Co. v. Tompkins* (1938) 304 U. S. 64, 58 S. Ct. 822, 82 L. Ed. 1188, 114 A. L. R. 1487.

It may be pointed out that it was a tort case.

The instant case is in equity, but the doctrine of the case is applied to equity cases.

Ruhlin v. N. Y. Life Ins. Co. (1938) 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290;

Rosenthal v. N. Y. Life Ins. Co. (1938) 304 U. S. 263, 58 S. Ct. 874, 82 L. Ed. 1330.

And it applies to questions of evidence.

Lyon v. Mutual Benefit Assn. (1938) 305 U. S. 484, at 489, 59 S. Ct. 297, 83 L. Ed. 303;

Cities Service Oil Co. v. Dunlap (1939) 308 U. S. 208, 84 L. Ed. 185, 60 S. Ct. 201 (Burden of proof);

Martin v. Cobb (1940) 110 Fed. (2d) 159, at 163.

It has long been the rule in the federal courts that the phrase, "laws of the several states," used in Section 34 of the Judiciary Act (28 U. S. C. A. Sec. 725, 1928) comprises the state statutes, and that the construction placed on them by the state courts, whether by the highest

or by lower courts, and even if the statutes deal with commercial law, is binding on the federal courts.

Erie R. Co. v. Hilt (1918) 247 U. S. 97, 62 L. Ed. 1003, 38 S. Ct. 435;

Burns Mortgage Co. v. Fried (1934) 292 U. S. 487, 54 S. Ct. 813, 78 L. Ed. 1380.

In the *Hilt* case Mr. Justice Holmes says:

> "In view of the importance of that tribunal in New Jersey [Intermediate Appellate Court], although not the highest Court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decision more doubtful than we do."

Now, the *Tompkins* case establishes the doctrine that the common law of the several states is likewise binding on the federal courts in diversity of citizenship cases.

2. It remains to formulate the rule which is to govern in ascertaining what the state common law is.

In the *Tompkins* case it is asserted that it is not a matter of federal concern whether the state law is declared by the legislature or "by its highest court in a decision."

In *Ruhlin v. New York Life Insurance Co., supra,* this Court declares on pp. 208-9 of the opinion:

> "Application of the 'state law' to the present case, or any other controversy controlled by *Erie R. Co. v. Tompkins,* does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts. Hitherto, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done

in actions brought in the federal courts involving what were known as matters of 'local' law."

(1) Is it nevertheless possible that this Court contemplates only decisions of the highest state court as announcing the law of the state, as intimated in the *Tompkins* case? And if there are no such decisions, that the federal courts may apply the federal rule?

(2) Or does the doctrine include within its scope the decisions of only the intermediate courts which are courts of last resort because no appeal is afforded to the highest court by the law of the state, as in *In re Wiegand* (1939) 27 Fed. Supp. 725?

(3) Or does it embrace the decisions of the lower courts from which appeal does lie, in the cases where the highest court has not spoken? A case of this kind is *In re Gilliam* (1906) 152 Fed. 605 (C. C. A., 7th, certiorari denied, 206 U. S. 563).

(4) Or does it comprehend the general body of the common law of the state irrespective of the source of the law?

That the last given is the biggest and soundest principle, is respectfully submitted. That is, the federal courts are bound to decide a case as they think the state courts *would* decide it if the state courts were deciding the same case, and not as they think the state courts *should* decide it. 18 *Oregon L. R.* 307; 7 *Fordham L. R.* 438.

It would be arbitrary to have regard only for the adjudications of the highest state court. Needless to say, lower courts—even nisi prius—often display a learning and sound judgment unsurpassed by pronouncements of the highest courts.

3. However, even if it be the correct doctrine that the decisions of the highest court only are the state law, the judgment of the Circuit Court of Appeals in the instant case is nevertheless erroneous, because the Supreme

Court of Ohio, which is that state's highest court, has expressly held demand is prerequisite in actions by shareholders of corporations for recognition of their rights and for mesne dividends, as in the case at bar.

In *Steverding v. Cleveland Co-operative Stove Co.* (1929) 121 O. S. 250, 167 N. E. 883, the plaintiffs sought to require the defendant company to transfer to them certain shares of which they claimed to be owners by assignment or gift, and to recover declared but unpaid dividends on such stock, and to have stock dividend certificates issued to them. The defendant interposed the defense of the statute of limitations. As to this defense the court says on p. 252 of the opinion:

> "The dividends declared during the period covered in the petition were not barred by the statute of limitations, for the reason that the statute did not begin to run until a demand had been made therefor * * * or until the corporation had denied to the actual or qualified owner of such stock the right to receive such dividends."

Is the case at bar not parallel to the *Steverding* case —or as nearly so as one case ever can be to another?

The only factual difference is that in the instant case the complainants may be remaindermen; that they are no longer, is shown below. The Circuit Court of Appeals assumes they are remaindermen, and implies this is a decisive fact. (R. 139.) But the court fails to indicate the reason why it is a decisive fact.

Remaindermen may resort to courts to protect their rights no less than those in possession, as "real parties in interest." Section 11241 General Code of Ohio; *Pomeroy's Equity Jurisprudence* (4th Ed.) Sections 1536, 2153.

Moreover, as fully shown below, when the life tenant sold the shares in question, her life estate terminated and all rights in the shares accelerated to these petitioners; and from the moment of sale petitioners were as much the absolute owners of the shares as if the life tenant had

assigned the shares to them. Therefore, when the respondent, after the life tenant's sale, cancelled the certificate evidencing the West shares, and issued a new certificate to the life tenant's purchaser, the respondent not only destroyed the petitioners' remainder interest, but petitioners' absolute ownership, and use and possession of the shares.

In consequence, whether the petitioners are regarded as remaindermen, or as absolute owners, they are seeking to restore their rights in the shares, and the principle of the *Steverding* case decided by the highest court of Ohio should be applied.

It follows that the Circuit Court of Appeals erred in refusing to follow the law of Ohio as declared in that case.

A similar case decided by the Supreme Court of Ohio which might be cited, is *Cleveland and Mahoning R. Co. v. Robbins* (1880) 35 O. S. 483, where the owner of the stock sold it, and, knowing his purchaser had not procured a new certificate to be issued in his name, represented to the company he had lost his certificate and caused a duplicate certificate to be isued. Thereafter his purchaser demanded of the corporation that the stock be registered in his (the purchaser's) name. The company refused, because it had issued a duplicate to the former owner. Suit followed and the company set up the statute of limitations.

The court held on p. 502 of the opinion that the statute did not run against the plaintiff "*until the transfer was refused,* or he had notice that the stock had been transferred to other parties." (Italics ours.)

THE OHIO COURT OF APPEALS.

4. However, if this Court should entertain the view that all rights in the stock did not accelerate to petitioners when the life tenant sold it on October 31, 1929, and that they are therefore still remaindermen, and if it should be the further view of this Court that petitioners are in error in invoking the rule laid down in the *Steverding*

case, then, the next question is, whether the decision of the state court of appeals is binding on the federal courts, or is not binding on them.

We have seen that that decision is *res judicata* on the necessity of demand, and also that it creates an unimpeachable vested right to assert the claim, and for these reasons is binding on all courts.

But there are further reasons why it should be followed: these reasons are, (a) that the decision declares the rule on demand in suits of this kind; and (b) the court is of such importance and dignity as to require the law declared by it to be followed by the federal courts.

(a) As to whether it is the only Ohio decision involving remaindermen, it is sufficient to say that none other has been found.

(b) The judicial system of Ohio is this:

The court of original and general jurisdiction is called the Court of Common Pleas; the first court of review is the Court of Appeals; and the next is the Supreme Court, which is the highest court.

The jurisdiction of the Court of Appeals is prescribed by the State Constitution, not by statute, and cannot be abridged or enlarged by statute.

Craig v. Welply (1922) 104 O. S. 312, 136 N. E. 143;

State v. Wallace (1923) 107 O. S. 557, 140 N. E. 305.

The Constitution of Ohio provides in part in Article IV, Sec. 6:

> "The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and to review, affirm, modify, or reverse the judgments of the court of common pleas, * * * and other courts of record within the district * * * and judgments of courts of appeals shall be final in all cases, except cases involving

> questions arising under the constitution of the United States, or of this state, * * * and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court. * * * and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

In the case at bar the Supreme Court refused to direct the court of appeals to certify its record. The Federal Circuit Court of Appeals (R. 140) asserts the refusal of the Supreme Court to issue an order to certify does not signify that the Supreme Court approves the law of the decision. Technically, that is correct; such ruling means that the highest court does not deem the case of sufficient "public or great general interest" under the Constitution, to warrant certiorari. The highest court has held that its failure to grant certiorari should not be regarded as a precedent in the same sense that its actual decisions are.

> *Village of Brewster v. Hill* (1934) 128 O. S. 343, 190 N. E. 766.

But the fact nevertheless remains that failure to order certification is in some degree an approval of the decision, and lends it partial sanction, and to this extent is the Supreme Court's pronouncement of the law. Lawyers are always concerned to learn whether a motion to certify was filed and overruled.

Again, only a small fraction of the cases litigated in the Ohio nisi prius courts and reviewed in the court of appeals, are attempted to be certified to the Supreme Court. And only a fraction of those knocking at the highest tribunal's doors are actually admitted. The highest court has absolute and arbitrary discretion in ruling on motions to certify—it may certify any case—and from its conclusions

there is no appeal. So that as a matter of fact, the judgments of the court of appeals are usually final. As above shown, the Constitution provides they "shall be final in all cases," with named exceptions. That tribunal is the court of last resort in the normal case.

For these reasons its decisions must be accorded a dignity and authority not unlike the decisions of the Supreme Court itself until the Supreme Court has announced its views.

What objections may be offered to this conclusion?

It is sometimes said that the federal courts are bound by decisions of lower state courts only when the lower courts have "state-wide jurisdiction." See case note, 53 *H. L. R.* p. 881. This principle was also asserted by the Circuit Court of Appeals in the instant case. (R. 140.)

When does a court have *state-wide* jurisdiction?

Is it when process issued by it can be served in any county of the state? Obviously, that is a mere matter of procedure?

Is it tenable to say that the Ohio court of appeals is one of only district jurisdiction, for the reason that it can review only the cases that are tried in the lower courts of its district, as prescribed by the constitutional provision above quoted?

But anyone may file a petition in such proceedings as quo warranto in any court of appeals in the state, and have process served anywhere in the state. Section 12313 of the General Code of Ohio.

If its decisions are sometimes in state-wide jurisdiction cases, and at other times in limited jurisdiction cases, depending on the local statutes, then are its pronouncements to have limited authority in some cases, and unlimited in others?

This query demonstrates the futility of a test so superficial as "state-wide jurisdiction."

The Circuit Court of Appeals also asserts the decisions of one state court of appeals are not binding on other state courts of appeals. (R. 140.) But the fact is that no court is bound by any decision in the State of Ohio, whether rendered by a low court or a high court. A nisi court may with entire impunity disregard and overrule the judgments of even the Supreme Court in other cases. And occasionally on further examination, the Supreme Court on review concurs with the nisi prius court. No doctrine infringes on any court except *stare decisis,* and this doctrine does not *bind* a court to follow even its own prior decisions. There is no binding force in this doctrine except that the public interest requires certainty and uniformity.

Kearny v. Buttles (1853) 1 O. S. 362, at 366;
State v. Yates (1902) 66 O. S. 546, 64 N. E. 570.

The decisions of a court of appeals are essentially not in the least binding on itself and the courts under it; not more binding than the decisions of other courts of appeals. This is the simple fact.

The argument that its decisions do not bind other courts of appeals is therefore superficial and insubstantial.

But the decisions of the Ohio courts of appeals are of importance in all the courts of the state, and declare the law of Ohio, in the absence of adverse pronouncements by the Supreme Court, and not merely the law of their districts.

It is above urged that the only sound rule in diversity of citizenship cases is, that the federal courts *should* decide as they think the state courts *would* decide in the same case.

This is a wholesome rule; all the reasoning of all the tribunals may thus be scrutinized for the particular rule of law. That is done in the state courts; and consistency requires that it be done in the federal courts, as clearly

suggested in the *Ruhlin* case; it is only thus that the state law may be fully absorbed and formulated.

For the law of the state is often well settled by a series of subordinate court decisions, which leave no doubt of the particular rule, but which do diverge from the federal decisions. In such cases, as pointed out in the *Tompkins* case, two citizens of the same state have different brands of justice.

If this doctrine is invoked, then no doubt can exist, for this particular reason alone, that demand was required in the case at bar, and the Circuit Court of Appeals erred in holding it was not required.

IV. SINCE DEMAND WAS REQUIRED, THE ACTION CANNOT BE BARRED BY ANY STATUTE OF LIMITATIONS; FOR STATUTES OF LIMITATIONS DO NOT RUN UNTIL DEMAND IS REFUSED. IF DEMAND WERE NOT NECESSARY, THE INSTANT ACTION WOULD NEVERTHELESS NOT BE BARRED BY ANY STATUTE.

1. Before discussing the statutes of limitations, a brief summary may be convenient to refresh the mind as to the germane facts.

Though it had in its possession a certified copy of the deceased Mr. West's will bequeathing to Grace C. West a life estate, and to the petitioners a vested remainder, and providing that the life tenant may not sell without the consent of the remaindermen, the respondent, in February, 1927, in breach of duty, issued its stock certificate for ninety-two shares to Grace C. West in her own name, enabling her to sell without such consent. Being enabled to sell, she did sell on October 31, 1929, to a bona fide purchaser for value; and endorsed the certificate over and executed a power of attorney authorizing transfer to her purchaser. On November 4, 1929, respondent, again in breach of duty, cancelled the West certificate and discarded it, and issued a new certificate to Mrs. West's purchaser, who had no knowledge of her life estate or her lack of

authority to sell the stock. The remaindermen had full confidence in the life tenant who was their stepmother and their true mother's sister and did not know the certificate issued to her failed to show her limited interest, or their remainder interest. Nor did they have the barest intimation that she had disposed of the stock in 1929 until Mrs. Spitler conveyed to Maurice J. West her unsupported suspicions that some of their securities might be gone.

It occurred to petitioners that if the certificates were properly issued, the life tenant would be unable to dispose of the stock without their consent. A block of the estate securities consisted of Cleveland Electric Illuminating Company stock; and, to reassure himself that his aunt, Mrs. Spitler, was in error in suspecting that some of their securities might be gone, Maurice J. West promptly repaired to the office of the Cleveland company to ascertain the form of the certificate it had issued to Mrs. West and whether that stock was intact. He found the stock intact and in proper form. He made some further inquiry, and concluded all the stocks, including respondent's, must have been properly issued and therefore must be intact, and dismissed the subject from his mind.

All this time respondent was possessed of a certified copy of the will, and was charged with full knowledge of these facts, (a) that it had wrongfully issued its certificate to Mrs. West in 1927, in such form as to enable her to dispose of the stock, (b) that she had actually disposed of it, and (c) that it had cancelled the West certificate in November, 1929 and issued a new certificate to a third person. And notwithstanding this knowledge and the fiduciary relation existing between it and all its shareholders, respondent failed and neglected to communicate such knowledge to petitioners, and now confronts them with the statute of limitations, and with their supposed laches.

Then, in 1934, the petitioners heard further rumors of the loss of their securities and Maurice J. West wrote

respondent company inquiring what the fact was, and learned Mrs. West had ceased to be a stockholder on November 4, 1929.

Shortly after that, on June 2, 1934, suit was filed against respondent company in the common pleas court.

The state court of appeals reversed the common pleas court on November 9, 1936.

The Supreme Court of Ohio overruled the motion to certify on January 20, 1937.

Demand was made on June 18, 1937.

And after refusal of the demand the instant suit was filed on July 14, 1937.

2. Now, it is not only the law of Ohio but the general rule that no statute of limitations begins to run where demand is necessary, until it is made and refused.

Steverding v. Co-operative Stove Co. (1929), 121 O. S. 250, 167 N. E. 883;
Railway Co. v. Robbins (1880), 35 O. S. 483;
Note, 47 *A. L. R.* 178;
26 *R. C. L.* Sec. 57, p. 1143.

3. But if no demand were necessary, the action would still not be barred by any statute.

The Circuit Court of Appeals argues (R. 141) that the cause of action arose in February, 1927, when the certificate was in the first instance wrongfully issued to Mrs. West in her individual name. This is doubtful, to say the least; for no loss occurred until November 4, 1929, when respondent cancelled and discarded the West certificate. Petitioners would probably have had a cause of action to reform that certificate from and after it was issued in 1927; but no action to restore the lost shares could possibly have accrued until November 4, 1929, for no loss occurred until then.

Marbury v. Ehlen (1890), 72 Md. 206;
Baker v. Atlantic Coast Line Railroad Co. (1917), 173 N. C. 365.

In *Glidden v. Mechanics' National Bank* (1895), 53 O. S. 588, at 602, it was held that the statute does not run against a pledgor until his pledgee, who had converted the property, had put it beyond his power to perform the pledge. It was not until then that the pledgor actually sustained a loss, and no cause of action could accrue before.

4. Again, the Circuit Court of Appeals takes it for granted that this is a tort action in trover, and that Section 11224 of the General Code of Ohio has application, and under that statute the action was barred in four years, that is, in February, 1931. The pertinent parts of that section read as follows:

> "An action for either of the following causes shall be brought within four years after the cause thereof accrued: * * *
>
> "2. For the recovery of personal property, or for taking or detaining it; * * *
>
> "4. For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated.
>
> "If the action be * * * for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered * * *."

This is the Ohio statute that governs trover cases.

40 *O. Jur.* Sec. 79, p. 60.

The life tenant may indeed be liable for the tort called conversion, redressible in the action known as trover, and an action against her would be governed by this section.

But the instant action is not against the life tenant—it is against the corporation that cancelled the certificate evidencing petitioners' property.

The relation between a corporation and its shareholders is essentially *contractual.*

Allen v. Scott (1922), 104 O. S. 436, at 439, 135 N. E. 683;

Keith v. State (1925), 113 O. S. 491, 149 N. E. 866.

And by the best and latest authorities, including New York, an action by a stockholder against a corporation for wrongful cancellation of his stock certificates, or other denial of his rights by wrongful transfer, is an *ex contractu* action, not *ex delicto*.

Fletcher on Corporations (Perm. Ed.), Section 5538, at p. 451;

Travis v. Knox Terpezone Co. (1915), 215 N. Y. 259, 109 N. E. 250 ("It is the enforcement of a contract between the corporation and its member.");

Steindler v. Va. Pub. Ser. Co. (1934), 163 Va. 462, 175 S. E. 188, 95 A. L. R. 220.

Since it is an *ex contractu* action, statutes other than the above apply. Section 11221 is the statute limiting actions on written contracts and reads as follows:

"An action upon a specialty or an agreement, contract or promise in writing shall be brought within fifteen years after the cause thereof accrued."

Sec. 11222 governs actions on oral contracts, and reads thus in part:

"An action upon a contract not in writing, express or implied, * * *, shall be brought within six years after the cause thereof accrued."

The Supreme Court of Ohio applied this six year statute in the *Steverding* case, *supra*; see p. 251 of opinion. The action there, as will be recalled, was to require issuance of certificates of stock to plaintiffs, and for mesne dividends, and to transfer to them certificates of stock dividends.

It would appear to be quite conclusive that this is a contract action and either the six year statute, or the fifteen year statute, governs. Since no statute could run until the loss of the stock in November, 1929, the action could not be barred even under the six year statute until November, 1935. But the Common Pleas Court case was filed on June 2, 1934, the previous year.

Therefore, assuming no demand were necessary and the statute nevertheless ran, though the demand was actually made, the original action was filed in the Common Pleas Court within ample time.

Suit was filed in the federal court on July 14, 1937, only some months after the "reversal" in the state courts on November 9, 1936.

Section 11233 General Code of Ohio provides in material part:

> "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff * * * may commence a new action within one year after such date. * * *"

The instant federal suit, having been filed within one year after "the date of reversal," in the state courts, was filed in time.

5. And there is a further reason why no statute of limitations bars the suit, even if no demand were necessary. It is that no statute runs until plaintiffs have notice of the wrongful transfer. The plaintiffs were ignorant of defendant's wrongs, which defendant necessarily was fully aware of; and defendant occupied a fiduciary relation to plaintiffs as the protector of their property; but it not only failed to protect it, but kept them in the dark about its loss. The courts all hold the corporation is trustee of the shares for the shareholder. It is a relation of trust and confidence. It may properly be regarded as even an express existing and subsisting trust.

> *Larwill v. Burke* (1900), 19 C. C. 449, 513, 10 C. D. 579, 605 (Aff. without opinion, 66 O. S. 683).

Whether or not it is an express trust, the relation is such as to set in motion the protective devices inuring to

plaintiffs in fraud cases. The statutes usually applied in such cases read that no bar can be interposed until the plaintiffs discover the wrong.

For example, Section 11224 of the General Code of Ohio provides that the statute does not run if the action "be for fraud, until the fraud is discovered."

In *Railway Co. v. Robbins* (1880), 35 O. S. 483, at 502, the Supreme Court of Ohio *expressly holds that no statute runs against a shareholder until he discovers the company's wrongful transfer.* This is for the reason that the company has sole control over the stock register.

The Ohio Supreme Court has frequently invoked the last named statute where the plaintiffs had no knowledge of wrongs by persons in control of their property. See *Morris v. Mull* (1924), 110 O. S. 624, 144 N. E. 436; *Seeds v. Seeds* (1927), 116 O. S. 144, 156 N. E. 193; and *Morton v. Petitt* (1931), 124 O. S. 241, 177 N. E. 591; *Larwill v. Burke, supra.* The last cited case is a corporate stock case.

However, we do not wish to dwell on the statutes of limitation in disproportion to their significance in this case. For here no statute can possibly be held to bar the action, upon any tenable consideration.

V. THE APPELLANTS ARE NOT BARRED BY LACHES, BECAUSE LACHES IS AN EQUITABLE DEFENSE, AND ALL THE EQUITIES IN THE INSTANT CASE ARE WITH PETITIONERS.

The Circuit Court of Appeals holds no demand was necessary, and therefore the action is barred by the statute of limitations; but the court holds further that if demand were required, there was too much delay between the wrong and the demand, and petitioners are therefore barred by laches. (R. 142.)

The court argues that especially does laches exist here for these reasons: the suit is in equity; no fraud or concealment is charged; respondent may well have lost its

remedy against the life tenant; and that there may be collusion between petitioners and the life tenant.

Would appellee company not have discovered and averred and proved collusion, and loss of remedy against the life tenant occasioned by delay, and made these facts part of the record in this case, which is wholly silent on these facts? This simple query reveals that court's fantasies.

In reference to fraud or concealment the record shows nothing except the passive concealment of respondent in failing to notify petitioners when the West certificate was issued in 1927 in defiance of the express terms of Mr. West's will, and in failing to give them notice of the presentation of that certificate for cancellation in 1929, or of its actual cancellation.

Whether the concealment was active or passive, the respondent was in fact at all times charged with full knowledge of its wrongs, and petitioners did not possess such knowledge. How the equitable defense of laches is valid under such circumstances, is difficult of comprehension.

What is the defense of *laches* in Ohio?

The Circuit Court of Appeals cites *Keithler v. Foster* (1871), 22 O. S. 27, and comments:

> "The demand under such circumstances is not to be delayed beyond the period of the statute, which in this case is four years."

The manifest fact is that *Keithler v. Foster* holds, as do all the cases, that demand may be made at any *reasonable time.* It need not be made within the period of the statute. The court says on page 31 of the opinion that what is a reasonable time depends on the circumstances of each case, and quotes from *Angel on Limitations,* as follows:

> "If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action."

That is, it may be assumed that the period of the statute is a reasonable time within which to make the demand. But if good cause for a later demand be shown, no laches supervenes.

In *Russell v. Fourth National Bank* (1921), 102 O. S. 248, at 267, 131 N. E. 726, the following is approved from 10 *Ruling Case Law*, 396, in reference to the rule barring actions by laches:

> "Its object is in general to exact of the complainant fair dealing with his adversary, and the rule was adopted largely because after great lapse of time, from death of parties, loss of papers, death of witnesses, change of title, intervention of equities, or other causes there is danger of doing injustice, and there can be no longer a safe determination of the controversy."

It will be noted that not one aspect of laches given in that decision is present in the instant case.

Lapse of time is not enough. There must be a great or unreasonable lapse of time. This is the first and foremost element of laches.

And plaintiff must have had knowledge of his cause of action.

> 4 *Pomeroy's Eq. Jur.* Sec. 1447.

Not only are an unreasonable lapse of time, and knowledge of the cause of action, essential elements, but also prejudice to defendant on account of the delay.

16 *O. Jur.* p. 111, puts the Ohio rule in this language:

> "The delay, knowledge, and acquiescence of the plaintiff, unless under circumstances giving rise to a presumption of abandonment, or the like, are not alone sufficient to constitute laches, without prejudice to another."

That the facts in this record do not bring the case within the rules governing laches, is so obvious, as to make further discussion superfluous:

The delay here is a few years;

The petitioners were not informed of the cause of action until 1934. The suspicion told to Maurice J. West in 1930 was soon dispelled by his own investigation. Almost immediately upon learning the stocks were gone, they filed suit;

And not one scintilla of actual, as distinguished from imaginary, evidence can be found in the record showing or tending to show the least prejudice suffered by respondent by reason of the delay in making demand.

VI. THE UNAUTHORIZED SALE OF THE STOCK BY THE LIFE TENANT TERMINATED HER LIFE ESTATE, AND ACCELERATED ALL RIGHTS IN, AND ACCRUING FROM, THE STOCK TO THE REMAINDERMEN AS OF THE TIME OF THE SALE. AND THE SALE, HAVING BEEN MADE POSSIBLE BY THE WRONGFUL ACT OF RESPONDENT, IS TO BE LAID AT RESPONDENT'S DOOR, AS OF THE TIME IT RECOGNIZED THE SALE, CANCELLED THE WEST CERTIFICATE AND ISSUED A NEW CERTIFICATE TO A THIRD PERSON.

1. The legal consequences of a tortious act are governed by the law of the place of the wrong.

Restatement of Conflict of Laws, Sections 378, 384;
5 *R. C. L.* p. 917;
15 *C. J. S.* p. 896.

2. The life tenant's conversion of the stock occurred in Massachusetts, and the law of that state applies as to the legal results flowing from the conversion.

In Massachusetts, as well as elsewhere, conversion of personalty by a limited holder terminates the limited estate of the converter and accelerates the property to the immediate use and possession of the reversioner, remainderman, or bailor, as the case may be.

The same consequences follow "tortious conveyance" of real estate by a life tenant, in that state, in the absence of statute. See discussion under 4 below:

In *Phillips v. Allen* (1863), 89 Mass. 115, a life tenant of land cut trees on the land, and then sold them. The remainderman sought to recover the value of the trees, and the Court says on page 116:

> "It is true that the plaintiff had no right to the standing trees, or any profits arising therefrom, during the continuance of the life estate, and it is only by the illegal acts of the tenant for life that any such claim exists. But by such acts the right to the timber and wood thus cut vested at once in the plaintiff, and to the amount in value of this property the ordinary interest should be added in assessing the damages at the present time."

A complete statement of the Massachusetts law which governs the instant case is found in *Leonard v. Stickney* (1881), 131 Mass. 541. At page 545 of the opinion, the Court cites *Phillips v. Allen, supra,* and then says:

> "By the illegal act of the tenant for life, the remainderman is invested with the right to property to which otherwise he would have no claim except at the termination of the tenancy. * * * Where one violates the terms of a bailment of personal property, by removing it from the place where alone he was entitled to use it, or by selling it, the rule is similar. His wrongful act terminates his possession, and the bailor has a right to it immediately. * * * The defendant was the tenant of the plaintiff. Articles which were part of the realty were let to her for use on the premises during the term. If by her wrongful act she separated them, they became at once the personal property of the landlord, and all right of the wrongdoer ceased therein."

This appears to be the universal rule, and not merely the law of Massachusetts.

In *Coffey v. Wilkerson* (1858) 58 Ky. 101, a life tenant of slaves sold them and they were eventually acquired by an innocent purchaser for value. The court held in an action by the remaindermen against the life tenant:

"Where, as in this case, the person holding the life estate converts not merely the life estate, but the absolute and entire estate in the property to his own use, and that with the effect of defeating the enjoyment of the estate in remainder, he becomes immediately responsible for the act to the persons entitled in remainder, who have a right to recover against him the full value of their estate."

This case is approved and followed in *Yeager v. Bank*, 127 Ky. 751, which was a corporation stock case.

In the Ohio case of *Allen v. Insurance Co.* (1894), 10 Oh. Dec. Repr. 204 (affirmed without opinion, 52 O. S. 622) the facts are: The testator bequeathed all his property to his wife for life; "the remainder of the estate unexpended by her" was bequeathed to persons mentioned; the wife was named as executrix, and after her death other persons were named to act as executors to make distribution of the property. Testator owned 225 shares of stock in defendant corporation.

The Company, erroneously assuming that under the will the widow was absolute owner, transferred the stock to her absolutely. Then in 1885 she sold to a purchaser for value without notice. She died in 1886, a year after the sale. After her death the executors filed suit against the corporation to recover the stock and mesne dividends. The questions were, What is the remedy? and, May recovery of dividends be made which accrued between the time of the widow's sale to the innocent purchaser and her death? The court held that the widow had only a life estate, that the company assumed otherwise at its peril, and on pages 211 and 212, concludes as follows:

"As the company caused the transfer without due authority, it is bound to return to the present executor, the same or an equal amount of stock, or to pay the value of the same in money, and for the amount of the dividends declared since the wrongful transfer."

If the court means what it says, the corporation was responsible to the remaindermen for the dividends from and after the wrongful transfer; that is to say, by her sale the widow lost the dividends which she would have been entitled to as life tenant up to the time of her death, if she had not sold; that is, from the time of her conversion to her death, the remaindermen were entitled to the income although she was still alive during that interval.

3. The doctrine of termination of a limited estate resulting from the wrongful acts of the custodian of property, is of general application. All the analogies of the law point to this doctrine.

As held in *Leonard v. Stickney, supra,* and in all the cases, conversion by a bailee terminates the bailment and vests the property in the bailor.

3 *R. C. L.* p. 149.

Where a converter by his efforts enhances the value of the property taken, he not only must give up the property, but loses the enhanced value as well.

Tracy v. Coal Co. (1926) 115 O. S. 298, 152 N. E. 641.

A like principle underlies the common law doctrine of *confusion of goods.* One who intermingles another's property with his own so as to destroy the identity of the other's property, not only must relinquish the other's property, but his own with it.

5 *R. C. L.* Sec. 4, pp. 1051, 1052;
Note, 10 *A. L. R.* 765.

4. Conversion by a life tenant not only annihilates the life estate, but also accelerates the remainder to immediate possession and use and to absolute ownership.

In 16 *O. Jur.* 493, the Ohio law is thus summarized:

"A vested remainder may be accelerated by the premature determination of the preceding estate. The general rule is that in the absence of a controlling

equity or of an express or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder, it takes effect in possession whenever the prior gift ceases or fails, in *whatever manner.*'' (Italics ours.)

In *Holt v. Lamb* (1867) 17 O. S. 374, at 387, it is said—

''Undoubtedly the law of remainder is, that it begins as soon as the life estate is at an end, *even though it be in the lifetime of the tenant for life.*'' (Italics ours.)

In *Fowler v. Samuel* (1912) 257 Ill. 30, the Court uses this language on p. 34 of the Opinion:

''* * * where the taking effect in possession of the ulterior devise or remainder is postponed only in order that a life estate may be given to a life tenant, upon the failure or destruction of the life estate the rights of the second taker are accelerated although the prior donee be still alive.''

Where the children of the testator are the remaindermen, and the widow is the life tenant, manifestly the remaindermen's possession is postponed only to make way for the life use. Then when the life tenant in some manner terminates her use, the absolute property immediately falls to the remaindermen.

A remainder is in like manner accelerated upon the widow's election to take according to law and not to take the provisions made by the will of her deceased husband.

Davidson v. Miner's and Mechanics S. & T. Co. (1935) 129 O. S. 418, 195 N. E. 845 (Syl. 1):

''* * * The widow's election is equivalent to her death so far as the will is concerned. * * *''

See also

Holdren v. Holdren (1908) 78 O. S. 276, 85 N. E. 537, 18 L. R. A. (N. S.) 272;

Millikin v. Welliver (1882) 37 O. S. 460;

28 *R. C. L.* 334; 21 *C. J.* 1142.

In the case at bar, the sale of the whole property, of necessity extinguished and terminated the life estate. It was merged into the remainder, and was extinguished as if the life tenant had died.

For the logic of the situation is this:

When the life tenant assigned the shares to an innocent purchaser for value, she assigned not only her life estate but also the remainder to the same holder; and wherever the lesser and the greater estate in the same property meet in the same person, the lesser estate is extinguished by merger.

A good statement of the doctrine of merger is given in a note in 93 *Am. St. Rep.* p. 153, where it is said:

> "Merger is the annihilation of an estate in another, and takes place usually when a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately merged, that is, sunk or drowned, in the greater."

The life estate in the stock having been annihilated and terminated, the vested remainder in it, inevitably accelerated in immediate possession and use, and the stock became the absolute property of petitioners.

And when respondent cancelled the certificate and registered the transfer to Paine, Webber & Co., on November 4, 1929, all the rights in and accruing from the shares of every kind, had already vested in petitioners.

5. As stated above, the "tortious conveyance" by a life tenant of real estate, as well as of personal property, effects a termination of the life estate. That was the rule at common law both in England and Massachusetts.

Tiffany on Real Property (2d Ed.), Sec. 427, thus states the rule of "tortious conveyance":

> "Since a feoffment operated on the possession alone, any person having possession of land, even though, as in the case of a tenant for years, not legally seised, could, by feoffment to a stranger, create in the latter

an estate of any quantum; and so one having seisin as of an estate for life could create in another a greater estate. Since the effect of such a transfer of seisin was to operate wrongfully upon the interest of the owner of the reversion or remainder, it was termed a 'tortious conveyance.'"

5 *Dane's Abridgement of American Law,* p. 13, cites *Commonwealth v. Welcome,* an early Massachusetts case, not affected by later statutes, but governed by the common law of that state, where a life tenant of land, without power to sell, conveyed, or purported to convey, a fee simple. It was held—

"* * * by his conveying an estate in fee, he destroys and annihilates his own life estate; it ceases to exist, is thus put out of the way and is ended; and then the entry of him next in remainder or reversion, accrues, as it always does, when the life estate next preceding is terminated."

Thus, at the common law of Massachusetts, both realty and personalty are governed by the same rule in regard to the effect of a wrongful conveyance by a life tenant; namely, such conveyance entails termination of the life estate, and acceleration of the remainder.

The conclusion must be that all the property rights in the shares in question were in the remaindermen when the certificate was presented to the corporation by Paine, Webber & Co., on November 4, 1929, and it thereupon cancelled that certificate and thus destroyed petitioners' property.

It might be noted, parenthetically, that because of the common law rule on the effect of tortious conveyance by a life tenant of real estate, the legislature of that state many years ago enacted a statute which is Section 9, Chapter 184, of the statutes of that state; such Chapter 184 is entitled, "General Provisions Relative to Real Property" and is expressly confined in operation to that species of property. Section 9 reads thus—

"*Deed of Tenant for life or years.*—A conveyance by a tenant for life or years which purports to grant a

greater estate than he possesses or can lawfully convey shall not work a forfeiture of his estate, but shall pass to the grantee all the estate which such grantor can lawfully convey."

This statute cannot by any process of reasoning be made to apply to personal property. And it will be observed that *Leonard v. Stickney, supra,* was decided many years after the enactment of this section and the statute is not mentioned in the opinion. That case involved personal property, and the statute relates to real property.

The reason for the statute is that under modern Recording Acts, the remainderman is protected by the public record. A purported conveyance by the life tenant of the whole of real property, does not convey the remainder—only the life estate; because the purchaser is charged with notice of the public record evidencing the remainder in others.

VII. A CORPORATION MUST RESPOND TO SHAREHOLDERS FOR LOSSES RESULTING FROM UNAUTHORIZED AND WRONGFUL TRANSFERS.

1. No one questions this principle. Many cases put the liability on the theory of *negligence.*

St. Romes v. Levee Steam Cotton Press Co. (1887) 127 U. S. 614.

Others hold it is *conversion.*

6 *Thompson on Corporations* (3rd Ed.), Sec. 4435.

In the leading case of *Loring v. Salisbury Mills* (1878) 125 Mass. 138, at p. 150, it is said, without declaring any theory:

"All the authorities affirm such liability where the corporation has notice that the present holder is a trustee, and of the name of his *cestui que* trust, and issues the new certificate without any inquiry whether his trust authorizes him to make a transfer."

2. Of course, the corporation need not respond where it does not have notice of the rights of the persons who are prejudiced by the wrongful transfer.

7 R. C. L. pp. 272, 273, states the rule as follows—

> "Where the corporation has notice that one of its stockholders is a trustee, or such notice is imputable to it, it is guilty of actionable negligence if it permits him to transfer the stock without any inquiry as to whether the *cestui que* trust has authorized the transfer. * * * It is generally held that the owner of the stock may sue to recover damages on the theory that by permitting his stock to be transferred without his authority, the corporation commits a technical conversion. The corporation must see that no unauthorized transfers of its stock are made, and is liable to any one injured by a breach or neglect of its duty."

The *Restatement of the Law of Trusts*, Sec. 325, Comment C says:

> "If shares of stock are registered in the name of the trustee followed by words indicating that he is trustee the corporation is bound to inquire whether the trustee is committing a breach of trust in making the transfer, and is liable for participation in the breach of trust if such inquiry would indicate that the trustee was committing a breach of trust."

Now, a life tenant occupies the position of *trustee* in respect to the remaindermen.

Johnson v. Johnson (1894) 51 O. S. 446, at 460, 461.

But, of course, it makes no difference who the custodian is. When the corporation has knowledge that one is "executor," "agent," "legatee," "pledgee," "life tenant," it must issue the certificate correctly, and protect the real or future interest holder in respect to transfers, the same as in the case of trustees.

2 *Cook on Corporations* (8th Ed.), Sec. 330, p. 1173;
Note, 56 *A. L. R.* 1199.

Where the corporation is put on inquiry as to the rights of third persons, it is chargeable with notice of all facts which an inquiry would have revealed. See Chief Justice Taney's opinion in *Lowry v. Bank* (1848) Taney's Opinions, 310 Fed. Cases No. 8,581, where are laid down the rules for such cases. The *Lowry* case is the leading American case, and is approved and followed in *Railroad Co. v. Robbins* (1880) 35 O. S. 483, 500.

In the 4th syllabus of the *Lowry* case, Chief Justice Taney says—

> "* * * the corporation whose stock is transferred is made the custodian of the shares, and is clothed with power to protect the rights of everyone from unauthorized transfers. It is a trust placed in its hands for the protection of individual interests, and like every other trustee, it is bound to exercise the trust with proper diligence and care; and it is responsible for any injury sustained by its negligence or misconduct."

A corporation is liable where the assignment of the stock, or power of attorney to transfer it, is forged; it is bound to know the genuine signatures of its shareholders. *Western Union Telegraph Co. v. Davenport* (1878) 97 U. S. 369, 24 L. Ed. 1047; *Moores v. Bank* (1884) 111 U. S. 156, 28 L. Ed. 385. And see Note, 56 *A. L. R.* 1199.

3. Respondent is therefore liable.

It is liable, *first,* because in 1927 it issued the certificate in the individual name of Grace C. West, directly enabling her to dispose of the property to petitioners' loss. It thus becomes a participant in the life tenant's act of conversion. *Lowry v. Bank, supra.*

And, *secondly,* when Paine, Webber and Co. in 1929 presented for transfer the certificate in her name endorsed by Grace C. West, respondent was bound to know these facts: that Grace C. West had only a life use in the stock, that she could not sell it, that by her sale she had converted

the stock, and that by acceleration it already belonged to petitioners. Having this knowledge, it was respondent's absolute and unqualified duty to protect petitioners' property. Instead, respondent cancelled petitioners' certificate, the evidence of their ownership, and used petitioners' property to discharge its liability to the innocent purchaser, who became an innocent purchaser because respondent by issuing the certificate in 1927 in the name of Grace C. West, falsely represented to all prospective purchasers, that she was the absolute owner.

For, when respondent wrongfully issued the certificate in 1927, in the name of Grace C. West, it must be held to contemplate and know, "that persons relying upon it will purchase the certificate in the market and meet with loss, should the person named in it not be the lawful owner of it. It must therefore be held to care in regard to this, and answer for any loss, the result of its negligence * * *." *Railway Co. v. Citizens National Bank* (1897) 56 O. S. 351, at pp. 384, 385. Such issuance therefore was a proximate cause of the loss.

Needless to say, respondent had no right to cancel petitioners' certificate, and to deprive them of their property, therewith to pay its obligation to an innocent purchaser who became purchaser solely through its own antecedent wrongful act.

A well considered case is *Baker v. Atlantic Coast Line Railroad Company* (1917) 173 N. C. 365, where the testator bequeathed stock of defendant to his son, John Baker, with a limitation over in event of his decease without issue.

The executor requested defendant to issue the certificate representing John Baker's shares in the name of John Baker without showing the executory interest over. This defendant did. Defendant did not have a copy of the will but did know it was dealing with an executor.

John Baker sold the shares to a bona fide purchaser for value and endorsed over the certificate to the purchaser. The purchaser presented the certificate for transfer and defendant cancelled the old certificate and issued a new one to the purchaser.

John Baker died without issue.

The future interest holders filed suit against the corporation to recover for wrongful transfer.

The court cites *Lowry v. Bank, supra,* and many other cases, and holds defendant was bound to inquire as to the will and its terms, because of notice that it was dealing with an executor, and allowed recovery, adopting the following from *Bayard v. Bank,* 52 Pa. 235:

> "They [the defendant corporation] are alike trustees of the property and of the title of each owner. They have in their keeping the primary evidence of title, and they are justly held to proper diligence and care in its preservation."

Respondent here was under a duty to preserve petitioners' certificate of stock, not to cancel it, to preserve, not to destroy, their property. It failed to do so, and is therefore liable.

In *Lowry v. Bank, supra,* Chief Justice Taney in the 8th syllabus says:

> "If these officers at the time of the transfer had reason to believe that the executor by the act of transfer was converting this stock to his own use in violation of his duty, then the bank by permitting the transfer enabled the executor to commit a breach of his trust, and upon principles of justice and equity, is as fully liable as if it had shared in the profits of the transaction."

Lowry v. Bank is also ample authority for the rule that the life tenant is not a necessary party in the action against the corporation. They are severally liable.

VIII. WHAT IS THE REMEDY? EQUITY WILL AFFORD COMPLETE RELIEF, INCLUDING DAMAGES.

These propositions have been so far established: demand was necessary; petitioners are not barred by laches or any statute of limitations; their vested remainder accelerated when the life tenant sold the property; and respondent is liable to them as absolute owners.

1. Now, *what is the remedy in equity?*

The remedy has already been mentioned as a by-product of the discussion.

7 *R. C. L.*, Sec. 251, p. 271:

> "If the corporation permits shares to be transferred without the owner's authority, it may be compelled to replace them or to pay damages."

6 *Thompson on Corporations* (3rd Ed.) Sec. 4428:

> "Equity will not only compel a corporation to make the transfer on its books in proper cases, but where stock has been transferred improperly or wrongfully by the corporation the original holder of such stock may by suit in equity compel the corporation to set aside such transfer and restore him to his rights as a stockholder."

Fletcher's Cyclopedia of Corporations (Perm. Ed.) Sec. 5551, pp. 500-502:

> "If a corporation recognizes a forged or unauthorised assignment of a certificate of stock * * * and registers the transfer on its books * * * it is guilty of a conversion of its shares, and the registered owner may maintain an action against it for damages, unless he is estopped to assert his title. * * *
>
> "Instead of suing at law for conversion, the owner of stock * * * may maintain a suit in equity to compel the corporation to replace the shares on its books in his name, and to issue to him a proper certificate, or, in the alternative, to recover a judgment for their value."

In support Fletcher cites cases from more than twenty important jurisdictions including New York and Ohio.

In *Cleveland and Mahoning Railroad Co. v. Robbins, supra,* the court says in Syl. 1:

> "* * * this breach of duty created a liability on the company to replace the stock to which F. was entitled, or to account for its value."

The Supreme Court of Ohio has uniformly so held.

Railway Co. v. Fink (1884) 41 O. S. 321;

Allen v. Insurance Co. (1894) 10 Oh. D. Repr. 204 (Aff. no Op., 52 O. S. 622), discussed *supra.*

Cook on Corporations (8th Ed.) Sec. 327, p. 1159:

> "The corporation may be compelled by the court to purchase an equal amount of stock and register it for the benefit of the *cestui que* trust."

One of the latest cases on the point is *West v. Tintic Standard Mining Co.* (1928) 71 Utah 158, 263 Pac. 490, 56 *A. L. R.* 1190, the court saying in Syl. 5:

> "One whose stock is wrongfully transferred on the books of the corporation may elect to compel the corporation to restore the stock or claim damages for its conversion."

2. But, of course, the restoration of the shares does not make the petitioners whole. They are also entitled to all dividends paid since the sale of the stock, and to the difference in value between that time and time of trial. As above shown, after October 31, 1929, it was their stock by acceleration.

In *Pollock v. National Bank* (1852) 7 N. Y. 274, 57 Am. Dec. 520, new certificates were issued on a forged power of attorney. The true owners filed suit in equity for recovery of the shares; the court holds:

> "* * * the bank is bound to issue new certificates *and account for the dividends.* * * *" (Italics ours.)

This case emphasizes the seriousness of cancelling the certificates, and has been followed many times both in New York and other states. See *Cushman v. Thayer Mfg. Co.* (1879) 76 N. Y. 369; *Salisbury Mills v. Townsend* (1871) 109 Mass. 121; *Pratt v. Taunton Copper Mfg. Co.* (1877) 123 Mass. 110, at 112, 25 Am. Rep. 37.

The federal courts have uniformly held the true shareholder is entitled to all dividends paid on the stock from the time of cancellation of the certificate.

Western Union Telegraph Co. v. Davenport (1878) 97 U. S. 369, 24 L. Ed. 1047;

Wilson v. Colorado Mining Co. (1915) 227 Fed. 721.

As will be recalled, *Allen v. Insurance Co.* (1894) 10 D. Repr. 204 (Aff. 52 O. S. 622), cited several times above, holds the dividends are recovered which were "declared since the wrongful transfer."

3. But, further, as above stated, the recovery of the stock, with mesne dividends, does not make petitioners whole. They are also entitled to damages. The New York rule applies as to the measure of damages, because this respondent's wrongs were committed in that state. 15 *C. J. S.*, p. 956.

Where the stock depreciates in value, the measure of damages is the value at the time of loss, with interest on such value. *McIntyre v. Whitney* (1910), 139 App. Div. 557, 124 N. Y. Supp. 234 (Aff. 201 N. Y. 526):

On the other hand, if the stock appreciates, the general rule applicable is thus stated in *Fletcher's Cyclopedia of Corporations* (Perm. Ed.), Sec. 5117, pp. 164, 165:

> "The so-called 'New York rule' is accepted as the rule generally applicable, in the absence of special circumstances, in many states, and seems to be growing in favor. Under it the proper measure of damages is the highest intermediate value of the stock between the time of conversion and a reasonable time

after the owner has received notice of the conversion to enable him to replace the stock."

In support Fletcher cites, *inter alia,* many New York cases.

After some conflicting cases, the above general rule was formulated in *Baker v. Drake* (1873) 53 N. Y. 211, 13 Am. Rep. 507, and affirmed and finally established in the leading case of *Wright v. Bank* (1888) 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356, where Peckham, *J.,* wrote the opinion, and says on p. 249:

> "It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock. * * *"

This Court has approved this rule. *Galigher v. Jones* (1888) 129 U. S. 193, 32 L. Ed. 658.

The rule is generally followed in Federal Courts. *Rivinus v. Langford* (1896) 21 C. C. A. 581, 75 Fed. 959; *Satterwhite v. Harriman National B. & T. Co.* (1935) 13 F. Supp. 493; *Wilson v. Colorado Mining Co.* (1915) 227 Fed. 721; *In re Swift* (1902) 114 Fed. 947; *McKinley v. Williams* (1896) 74 Fed. 94; *Clements v. Mueller* (1930) 41 Fed. (2d) 41.

In other words, the measure of petitioners' damage, is either the value at the time of loss, or the highest value within a reasonable time after notice of the loss, whichever affords the greater recovery.

Satterwhite v. Harriman Bank, supra, decided in 1935, Syl. 1, states this alternative rule thus:

> "Measure of damages for conversion of corporation stock is market price at time of *actual conversion* or highest price within a reasonable time after owner has received notice of conversion, whichever of the two prices is higher." (Italics ours.)

Where the conversion is malicious or wilful, it may be stated, parenthetically, the measure of damages is the highest value up to the time of trial. *Kavanaugh v. McIntyre* (1911) 133 N. Y. Supp. 679, 74 Misc. 222.

It cannot be claimed in the instant case that the measure of damages is the value at time of demand in 1938, when the value was much less than it was before. (R. 48.)

Satterwhite v. Harriman Bank, supra, uses the phrase "at time of actual conversion."

The time of demand and refusal is immaterial, where an independent act of conversion was committed. *Sedgwick on Damages* (9th Ed.) Sec. 492.

In *Railroad Co. v. Robbins* (1880) 35 O. S. 483, the court held the cause of action did not accrue and the statute of limitations did not begin to run, until demand was refused, or plaintiff had notice; but the measure of damages was not fixed as of that time.

The right to sue is to be distinguished from the measure of damages. They are separate and independent. *Beale's Conflict of Laws,* pp. 85, 86.

4. However, to avoid controversy as to what value is to be taken, and what was a reasonable time after the conversion, petitioners have not urged recovery on that basis, but ask damages on the basis of the value at the time of the cancellation of the certificate on November 4, 1929, with interest. The stock having been restored by the district court, the amount of damages is the difference between the value of the stock at the time of cancellation and its value at the time of suit. The former was 239.4 and the latter 146⅓, a difference of $8,556.00 in money.

Having brought their suit in equity, petitioners' recovery should therefore be: (a) Restoration to them, not in trust, of the ninety-two shares; (b) Judgment for all dividends thereon since November 4, 1929, to the time of trial, aggregating $7,452.00, with interest on the respective dividends from time of payment; and (c) Judgment for $8,-

556.00, representing the difference between the value of the stock on November 4, 1929, and its value at the time of trial, with interest from that time.

5. It cannot be claimed that the Uniform Stock Transfer Act in some way changes the corporation's liability; this act is declaratory of the common law and merely codifies the common law.

West v. Tintic Standard Mining Co. (1928) 71 Utah 158, 263 Pac. 490, 56 A. L. R. 1190, is one of the latest cases holding the liability of corporations for wrongful transfers, is not changed by this Act.

Ohio is in accord. *Booth v. Cinn. Finance Co.* (1923) 19 App. 130 (Aff. 111 O. S. 361); *Laundry Co. v. Whitmore* (1915) 92 O. S. 44, at p. 54; *Railway Co. v. Bank* (1897) 56 O. S. 351.

Nor is it a tenable contention that a chancellor is without power to award damages as well as restore the lost stock in kind, with mesne dividends and interest.

In *Steindler v. Virginia Public Service Co.* (1934) 163 Va. 462, 175 S. E. 888, 95 A. L. R. 220, a late case, it is said in Syl. 3:

> "Where equity has once acquired jurisdiction of a cause, it may go on to complete adjudication, even to the extent of establishing legal rights and granting legal remedies."

On same point see, also, *Travis v. Knox Terpezone Co.* (1915) 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 387; *Thompson on Corporations,* (3rd Ed.) p. 291; 14 *C. J.* 1169.

Equity affords complete relief. It delights in doing complete justice. And nothing short of the relief here outlined will make petitioners whole and afford them complete justice.

Nor is this a proper case for application of the rule that equity abhors a forfeiture. The life tenant annihi-

lated the life estate by her own act of unauthorized sale before the suit was filed. In such cases the rule has no application. Equity does not decree forfeiture.

Big Six Development Co. v. Mitchell (1905), 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332 (Certiorari Denied).

C. CONCLUSION.

The will of Charles P. West, deceased, bequeathed to his widow a life use, and to petitioners a vested remainder;

The sale of the stock by the life tenant terminated her life estate as if she had died, and of necessity, the life use being extinguished, the remainder accelerated to plaintiffs' immediate use and enjoyment as their absolute property;

Respondent's cancellation of the certificate of stock, after sale by the life tenant, with full knowledge of petitioners' rights, further charged respondent with full knowledge of the life tenant's conversion and of the consequent acceleration of the remainder;

It was thereupon the duty of respondent, not to cancel petitioners' certificate, but to issue a certificate to them, in their name, and to pay them dividends from that time;

Having failed and refused to do so, respondent is now required to place petitioners in the position they would have occupied, had respondent performed its legal duty. This necessarily means that it must restore the stock, pay the dividends thereon from the time of acceleration, with interest on such dividends, and pay them the difference in the value of the stock between the time the certificate was cancelled and they were entitled to the stock, and the time of the trial, with interest on the difference. No other recovery will fully indemnify petitioners under the law;

And equity is fully competent to afford the relief they are entitled to.

Nor is the suit barred by the statute of limitations, or by laches.

To place petitioners in the precise position they would now be occupying if wrongs had not been committed by the life tenant, and by the respondent, as the district court did, means to encourage wrongdoing, and reward the guilty. Such consequences the law should not stoop to countenance.

Respectfully submitted,

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August 15, 1940.

In the Supreme Court of the United States

OCTOBER TERM 1940.

Nos. 44 and 45.

CHARLES PEYTON WEST,
MAURICE JOHN WEST,
Petitioners,

vs.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

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Respondent's brief contains certain misleading assertions and half-truths which petitioners feel obliged to challenge by means of this Reply Brief.

1. *On page 4* of Respondent's Brief, it is asserted that the second transfer in 1929—the cancellation of the West certificate—was not "negligent or wrongful," because, if respondent had refused to issue a new certificate to the bona fide purchaser, it "would have been liable to the assignee [bona fide purchaser] under the Uniform Stock Transfer Act."

To support this statement, *Finance Co. v. Booth,* 111 O. S. 361, is cited, improperly, as shown below.

Then follows this *non sequitur* assertion:

"* * * therefore, the second transfer was not the proximate cause of any injury to the plaintiffs."

In support of this assertion Judge Lurton's opinion in *Smith v. Nashville & Decatur R. Co.*, 91 Tenn. 221, is cited, also erroneously as shown below.

The proposition that respondent would have been liable to the bona fide purchaser, if it had refused to issue a new certificate in 1929, is, of course, correct.

The fallacy lies in the claim that therefore respondent owed no duty to protect the petitioners' interests. The duty to the petitioners and the duty to the bona fide purchaser are separate and distinct duties, not correlative duties.

And it is to be noted that the duty to the bona fide purchaser arose directly from the wrongful issuance of the certificate in 1927 in the life tenant's own name. If that certificate had been properly issued, there would have been no bona fide purchaser.

As pointed out in petitioners' principal brief, respondent owed the petitioners two duties:

(1) To evidence their remainder interest in the certificate issued to the life tenant in 1927; and

(2) To protect the remainder interest in 1929 when the certificate of 1927 was presented by the bona fide purchaser for cancellation.

We are not concerned in this case with any duty owing to the bona fide purchaser. We are concerned only with the duties owing to petitioners.

Especially is this so where the innocent purchaser became such by respondent's breach of duty to petitioners. Its duty to the innocent purchaser arose from its own wrong. Therefore, respondent cannot exculpate itself of its liability to petitioners on the ground of its liability to the innocent purchaser.

In *Finance Co. v. Booth*, the court decides one question only—what the Ohio measure of damages is, where a corporation refuses on demand to issue a new certificate to a bona fide purchaser. See page 365 of the opinion.

Smith v. Nashville & D. R. Co. is cited as holding that the transfer to the bona fide purchaser in 1929 and the consequent destruction of the West certificate are not the proximate cause of the loss to the petitioners.

This is definitely not what that case holds. The owner of corporate stock left a will bequeathing it to his daughter for life, but not naming an executor in the will. An administrator with the will annexed was appointed, who administered the estate and distributed the stock, endorsing the certificate which was in the name of the deceased as "administrator" without showing in the endorsement that he was administrator "with the will annexed." The corporation had no knowledge of a will and, assuming she took the stock as heir, issued the new certificate in the daughter's name without any limitation. The daughter sold the stock. In an action by the remaindermen against the corporation, Justice Lurton held the corporation was not liable because it had no knowledge of the will and was under no duty to inquire whether there was a will from the mere fact that an administrator was making the distribution. The court recognizes the rules petitioners here urge. There is nothing in the case justifying respondent's interpretation of it.

Baker v. Atlantic Coast Line Railroad Co. (1917) 173 N. C. 365 holds the proximate cause of the loss is the second transfer and, in commenting on the Tennessee case, finds it is in accord with general law.

2. *On pages 5 to 10* of Respondent's Brief, it is asserted that some peculiar rule of law obtains in Ohio as to the rights of life tenants, and, not without some effrontery, it is declared on page 8 that the life tenant in the case at bar, under the law of Ohio, was entitled to have the stock issued in her name without evidencing any limitations.

But, in the same breath, on the same page, it is conceded that this is so only, "in the absence of restriction in the will, or objection by the remainderman or the Court." This concession necessarily refutes its argument. For the

will here bequeaths only a life estate and expressly provides that the life tenant cannot sell without the consent of the remainderman.

However, no such sporadic rule of law applicable to life estates as respondent professes to find in the Ohio cases, in fact exists. The law of Ohio is fully in accord with the law generally:

(1) A life tenant is entitled to possession because he has the use of the property, and in the case of stocks, the life tenant is the one who votes the stocks. This is the universal rule. See *Posegate v. South* (1889) 46 O. S. 391, at p. 395.

(2) And it is the further universal rule that the issuer of registered securities, e.g. stocks and bonds, has a duty to protect the rights of future interest holders whenever it has actual or constructive notice of such rights. *Allen v. Insurance Co.* (1894) 10 D. Repr. 204 (Affirmed, without opinion, 52 O. S. 622), and other cases cited on pp. 36 to 38 of principal brief.

3. *On page 7* of its brief, respondent reiterates the contention that the probate court, upon approving distribution in kind in 1927, expressly directed distribution to Mrs. West without limitation.

There are two conclusive answers to this:

(1) The court expressly found that Mrs. West was bequeathed only a life estate (R. 68); and

(2) Even if the probate court had made an explicit order that Mrs. West was the absolute owner of the stock and the new certificate should therefore be issued in her name without limitation, the respondent would still not be relieved of the duty to protect the remaindermen, because the probate court of Ohio has no power to fix the rights of distributees.

In addition to *Swearingen v. Morris*, 14 O. S. 424, and *Armstrong v. Grandin*, 39 O. S. 368, which two cases, re-

spondent admits on page 9 of its brief, hold that the probate court has no such power, this federal case may also be cited as declaring this doctrine:

Brown v. Routzahn (1931) 59 Fed. (2d) 329, at 333.

4. *On page 8* of Respondent's Brief the question is asked, Why is a remainderman of stocks to be given a protection by the issuer of the stocks, which is not enjoyed as to cash, chattels and unregistered securities?

These are sufficient answers to that query:

(1) As shown on pages 36 to 38 of the petitioners' principal brief, a corporation is trustee of its shares, and as such trustee owes a duty to all persons who are known to have rights in its shares to make lawful transfers to them, whether such rights are legal or equitable, in possession or expectant, vested or contingent. This is a fundamental rule.

(2) A second answer is that a like protection is indeed afforded in respect to cash, chattels and unregistered securities. A third person who knowingly deals with a life tenant, trustee, bailee, or other limited holder of any species of property, owes a duty to the expectant holder; he is charged with inquiry as to the limitations on the powers sought to be exercised by the limited holder; such third person deals with the limited holder at his own peril. This is also a fundamental rule. For example, a bank cannot surrender funds to a trustee who is known to the bank to be withdrawing the funds in breach of trust.

Restatement of Law of Trusts, §324.

(3) It is argued *on page 5* of Respondent's Brief that if the remainderman does not avail himself of Section 10509-185, General Code of Ohio, which section is quoted on that page, then he must suffer the consequences; and it is argued that that section contemplates that stock may be issued to a life tenant without limitation, and the remainderman has the responsibility to require security. But, may

not the precise contrary be true? In view of the fundamental rule that a corporation which has notice of an expectant interest must protect such interest, does not the remainderman have the right to assume that the corporation will discharge its legal duty, and, as to stocks, he need not see to the security he might require as to cash, chattels and unregistered securities? For it is also an elementary rule of law, that in all cases where the future interest is shown to be in peril, equity will afford the holder protection. If no such showing is made, the protection is not afforded. And the statute above referred to is merely declaratory of the means available to a remainderman when he requires additional protection irrespective of the kind of property. See 21 *C. J.* pp. 965 to 968.

5. *On page 13* of Respondent's Brief, it is asserted that petitioners have not hitherto claimed the instant action is *ex contractu*. Petitioners are not aware of any rule of this Court prohibiting tenable arguments, even if not advanced before.

However that may be, there has been no earlier occasion in the Federal Courts to discuss the statute of limitations, because the Ohio Court of Appeals held no cause of action accrued until demand had been refused; and no statute of limitations can run in any case until the cause of action accrues.

6. *On page 14* of Respondent's Brief, it is contended:

(1) That trover can be brought only by one who has, or is entitled to, possession; and

(2) That the Kentucky cases so hold.

The first assertion is questionable, and the second assertion is certainly entirely erroneous.

(1) The cases cited on pages 29 to 36 of petitioners' principal brief show that all rights in the West stock accelerated to petitioners when the life tenant sold the stock; and that therefore when respondent cancelled the West

certificate in 1929, the petitioners were the absolute owners entitled to possession. See, also, *Samborn v. Colman* (1832), 6 N. H. 14. And if possession is necessary to maintain trover, the instant action is proper.

However, assume for the sake of argument that acceleration did not occur, and assume further that the action against the corporation—not against the life tenant—for restoration of the stock and incidental rights is an *ex delicto* action, though both assumptions are contrary to settled law, nevertheless Respondent's contention may be erroneous.

Under the technicalities of common law pleading, possession, or the right to possession, appears to have been essential to maintain trover.

But common law pleading niceties are repugnant to the liberalities of code pleading, which prevails in Massachusetts and Ohio, the two states with which we are concerned.

Under the assumption above made, the petitioners, as remaindermen, are nevertheless the owners of the property subject only to a life estate, and therefore it is reasonable that conversion of the property or injury to it should be redressible by them.

In *Nash v. Lang* (1929), 268 Mass. 407, at 414, Rugg, *C.J.*, says in reference to the right of a bailor to bring an action for damages against a third person who injured the property of the bailment:

> "The general title remains in the bailor; the bailee has a special interest for the purpose of the bailment. The bailor may maintain an action against a third person for permanent injury to the chattel or for its conversion or for its replevin."

In discussing trover cases, and referring particularly to the above liberal statement in the Massachusetts case, Prof. Edward H. Warren says in 49 *H. L. R.*, p. 1104:

> "It is well within the bounds of probability that the courts in other jurisdictions with statutes similar to Massachusetts statute, will approve the statement of the learned Chief Justice in *Nash v. Lang*. We submit that this makes the law more simple and more sensible than it once was. Wherever this is law, it is no longer true that in no case can an owner qualify as a plaintiff in an action for a conversion unless he can show that at the time of the conversion he had the possession or the right to immediate possession."

In *Railroad Co. v. O'Donnell* (1892), 49 O. S. 489, the question was whether the consignee of goods had to have possession, or the right to possession, to recover damages for conversion of the goods. And the court holds on page 503 of the opinion that possession is necessary only in seeking to recover the property, but not in an action for damages for its conversion, title being sufficient.

(2) The Kentucky cases cited by respondent do not hold as respondent contends. They definitely hold that the unlawful conversion of the property by a life tenant, accelerates the rights of the remaindermen, and therefore they are entitled to possession. If possession is necessary for trover, the instant action may be maintained.

7. *On p. 26* of Respondent's Brief it is said that no demand preceded the filing of the cases there cited.

The plain fact is, as disclosed by an examination of those cases, that the necessity of demand is not decided or discussed. But on p. 367 of *Baker v. Atlantic Coast Line Railroad* (1917), 173 N. C. 365, it is recited that demand was there made. In *Lowry v. Bank* (1848), 15 Fed. Cases No. 8,581, Taney's Reports, 310, Chief Justice Taney refers to the refusal of the corporation to recognize the plaintiffs' rights; there could have been no refusal without a demand.

8. *On p. 29* of Respondent's brief it is strenuously argued that the Ohio Court of Appeals, in holding demand prerequisite to suit, misapplied well-settled Ohio law.

The argument is that demand was not essential, the action sounds in tort, and the four year statute of limitations bars it.

Petitioners attempt to answer this argument fully in their principal brief, as follows:

On pp. 9 and 10, that the Ohio decision in this case on demand is *res judicata* and binding on all courts.

On pp. 11-20, that the Ohio decision in this case establishes the law of Ohio, binding on the federal courts under *Erie Railroad v. Tompkins.*

On pp. 15-20 that even if the rule is that only decisions of the highest court of the state are binding on the federal courts, the Ohio Court of Appeals is the court of last resort in the normal case and therefore its decisions bind the federal courts, especially since the Supreme Court denied review.

On p. 22 that by the decisions of the Supreme Court of Ohio in other like cases demand is held necessary.

On pp. 22-26 that the action would still not be barred because (1) it is an *ex contractu* action (p. 23), and the six year statute applies; and (2) the relation between stockholder and corporation is a fiduciary one and therefore no statute runs until the stockholder knows of the wrongful transfer (p. 26). The latter is the holding of the Supreme Court of Ohio in *Railroad Co. v. Robbins* (1880), 35 O. S. 483, at p. 502, as pointed out on p. 26 of the principal brief.

In other words, to make the defense of the statute of limitations a valid defense, it must be held:

(1) That demand was not essential.

So to hold is to set aside the doctrine of *res judicata*; and to flout the decisions of the Supreme Court of Ohio.

And it must also be held that the action sounds in tort, and is barred in four years.

To so hold is to ignore established theory that the action is *ex contractu* and the six year statute applies. On

this point, in addition to the cases cited in the principal brief, see 18 *C. J. S.* p. 1066.

(2) Or it must be held that no fiduciary relation exists between shareholder and corporation.

But all the authorities recognize such relation.

And when such relation exists no statute runs until the wrong is discovered. The *Robbins* case so holds. The court in the *Robbins* case fails to give the reason for the holding. The only possible reason is the fiduciary relation. The theory is that the corporation is to be charged with constructive fraud, or fraudulent concealment.

Yeager v. Bank (1908), 127 Ky. 751, expressly so holds. In th t case the action was barred because the remaindermen did not sue within the period of the savings clause after discovery of the wrongful transfer.

This is a general doctrine applied to fiduciary relations, as shown on p. 26 of petitioners' principal brief.

One final word about *laches.*

Nor can the action be barred by laches because the elements of laches are not present. The Circuit Court of Appeals misapprehended the law of laches. It declares that on account of the delay in making demand petitioners are barred because respondent "may well have lost its power to protect itself by action against the life tenant," and declares further that the life tenant was "the principal tort feasor." (R. 142.)

Now, the life tenant and the corporation are equally wrongdoers. *Lowry v. Bank, supra,* 8th syllabus, where it is said:

> "* * * the bank by permitting the transfer enabled the executor to commit a breach of his trust, and upon principles of justice and equity, is as fully liable as if it had shared in the profits of the transaction."

There is not a principal and a secondary wrongdoer.

The rule that one wrongdoer cannot obtain contribution or indemnity from another is grounded in the firmest considerations of policy.

Royal Indemnity Co. v. Becker (1930), 122 O. S. 582, 173 N. E. 194, 75 A. L. R. 481;

Union Stockyards Co. v. Railroad (1905), 196 U. S. 217, 25 S. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525.

The Circuit Court of Appeals is therefore in error in applying the doctrine of laches for two reasons:

(1) No actual, as distinguished from fictional, prejudice to respondent appears in the record; and

(2) No action for contribution or indemnity is possible because respondent is no less a wrongdoer than the life tenant. By its breach of trust it enabled the life tenant to commit a breach of her trust, and it "is as fully liable as" the life tenant. The usual rule applies.

Respectfully submitted,

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Attorneys for Petitioners.

In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. 888. 44
No. 889. 45

CHARLES PEYTON WEST, *et al.*,
Petitioners,

vs.

THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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No. 888.

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vs.

THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

SUPPLEMENTARY STATEMENT OF THE CASE.

This action is one brought by petitioners in equity to secure redress for an alleged wrongful transfer of the stock in the respondent telephone company. The stock in question had been left by the will of petitioners' father to petitioners' step-mother for life, remainder to the petitioners. The petitioners' theory was that the respondent in 1927 was negligent in issuing stock certificates to petitioners' step-mother without limitation, as a result of which petitioners' step-mother in 1929, by deliberate wrong, sold the stock. (R. 2-3.)

The present action* followed a former suit on the same cause of action in the Ohio courts, begun in 1934.

* Begun July 14, 1937, in the United States District Court for the Northern District of Ohio, Eastern Division. (R. 2.)

The latter case was carried to the Court of Appeals of Cuyahoga County, Ohio, which rendered "final judgment" for respondent. (R. 114.) The judgment of the state Court of Appeals was unqualified but its opinion, referred to in its mandate but not filed (R. 113), gave as the *reason* for the decision that until demand was made no cause of action accrued to petitioners. The Supreme Court denied without opinion a motion to certify, similar to a petition for certiorari in this Court. (54 O. App. XLIII.)

The petitioners in their petition (pages 2 and 3) state five principal questions which, they claim, are presented by this case. We must supplement their statement of the second question (Pet. 3) by pointing out that there are two questions of *res judicata* involved: (a) whether the unfiled *opinion* of the state Court of Appeals is *res judicata*, as the petitioners claim, and (b) whether the *judgment* of the state Court of Appeals is *res judicata*, as the respondent contends.

Another question, not stated by petitioners, is the proper interpretation of Section 11224 of the General Code of Ohio, the statute of limitations.

Finally, and most important, is the question whether the respondent was negligent in issuing the certificates to petitioners' step-mother, particularly in view of the fact that both petitioners joined in the application for distribution to the step-mother. (R. 66, 67.)

Thus there are at least three issues in addition to the five noted by the petitioners.

ARGUMENT.

I. No federal question is appropriately raised for decision by this Court.

The present controversy is one of only private interest to the litigants, involving the alleged negligent issuance of stock certificates. It has thus far been in litigation for almost six years and involves an alleged wrong which took place more than thirteen years ago. The case has been before five courts thus far; the Common Pleas Court of Cuyahoga County, Ohio; the Court of Appeals of Cuyahoga County, Ohio; the Supreme Court of Ohio (on motion to certify, not on the merits); the United States District Court for the Northern District of Ohio and the Circuit Court of Appeals for the Sixth Circuit. Both state and federal appellate courts decided in favor of the respondent and the Ohio Supreme Court refused to entertain an appeal. The two nisi prius courts decided in favor of the petitioners. Plainly this case, considering that it involves purely private law, has had all the judicial consideration it deserves.

Of the numerous questions raised in the case, only one suggests a question of federal law. The issues of *res judicata*, the issues with respect to the statute of limitations and laches, the issue as to whether the action sounds in tort or contract, and the question of acceleration of remainders are all questions of general jurisprudence and involve no novel legal points.

There is thus only one question which, even on the presentation made in the petitioners' brief, might present an appropriate matter for consideration by this Court. That is the question whether the federal courts are bound, under *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938), to follow an unfiled opinion of the Court of Appeals of Cuyahoga County, Ohio, on the question whether demand was a necessary preliminary to suit by the petitioners.

Even this question is not so raised in the case that this Court would be called upon to decide it, if certiorari were

granted. In the first place the ruling upon the point was an alternative holding. The decision in favor of the respondent was based equally upon the Circuit Court of Appeals' conclusion that the petitioners were guilty of laches in making their demand and prosecuting their claim.* (R. 142.) Judge Simons concurred in the result only on the latter ground.** (R. 143.) Consequently, this Court would not be called upon to rule upon the matter of applying *Erie Railroad v. Tompkins* unless it reversed the finding of all three Judges of the Circuit Court of Appeals that the petitioners were barred by laches.

There are six other issues in the case, some not decided by the Circuit Court of Appeals, on five† of which this Court will be required to find in favor of the petitioners before a reversal of the Circuit Court of Appeals will be necessary or permissible.

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* The opinion of Judge Allen holds that the respondent was at fault in issuing the certificates but that (1) the action is barred by the statute of limitations because (a) by the best rule demand is not a prerequisite to suit, (b) the decision of the Ohio Court of Appeals to the contrary is not binding, and (c) the four year statute of limitations applies and there is no saving clause applicable; and (2) recovery is *also* barred by the petitioners' laches in making demand and prosecuting their claim.

** Possibly he failed to concur in the ruling on the applicability of the *Tompkins* case because petitioners had not argued the point, having relied only on the effect of the Ohio Court of Appeals' opinion as *res judicata*.

† One of the issues stated in the petition (p. 3), that of acceleration of the remainder, was raised by the petitioners' appeal to the Circuit Court of Appeals. If this Court should find against the respondent on all the other points, a finding in favor of the petitioners on this point would not be necessary to permit a reversal.

II. There is no necessity for this Court to decide whether under Erie Railroad v. Tompkins a decision of the Ohio Court of Appeals is binding upon the federal courts.

It is not necessary for this Court to determine whether decisions of lower state courts are binding upon the federal courts because it is already clear from the decisions of this Court, both before and after the decision in *Erie Railroad v. Tompkins*, that only the decision of the highest state court is binding. In *Graham v. White-Phillips Co., Inc.*, 296 U. S. 27 (1935), it was held that a decision of the Court of Appeals of Illinois (an intermediate appellate court) construing the Illinois negotiable instruments law was not binding on federal courts. The decision in *Erie Railroad v. Tompkins* itself specifically refers to the "highest court" of a state as being, together with the state legislature, the authority which the federal courts must follow. (304 U. S. 64 at 78.) Similar references to the highest court of the state appear in *Lyons v. Mutual Benefit Association*, 305 U. S. 484 at 489 (1939), and *Wichita Royalty Company v. City National Bank*, 306 U. S. 103 at 107 (1939).

The decision in *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202 (1938), cited by petitioners (Br. 11), is no ruling to the contrary. It merely remanded the case to the District Court for determination of what the state rule on the question was, without stating whether state lower court cases should be followed.

The decision in *Blair v. Commissioner*, 300 U. S. 5 (1937) (Pet. Br. 11), was a tax case in which it was held that the decision of the Illinois Court of Appeals construing certain assignments was binding upon the federal court in determining the effect for purposes of taxation of the same instruments. The point there involved was in the nature of *res judicata* (see 300 U. S. at 10) and the decision cannot be deemed to have overruled the square holding of this Court in *Graham v. White-Phillips Co., Inc., supra*, with respect to the effect of decisions of the Illinois

Court of Appeals. The case of *Erie Railroad v. Hilt,* 247 U. S. 97 (1918) (Pet. Br. 11), involved, we submit, only the *persuasive power* of a decision of the New Jersey Supreme Court.

The cases in the Circuit Courts of Appeals are too numerous to discuss, but we may observe that since the decision in *Erie Railroad v. Tompkins* there has been no real conflict with the decision in the instant case. *Hack v. American Surety Company,* 96 Fed. (2nd) 939 (C. C. A. 7, 1938) (Pet. Br. 11), is no more than an intimation to the contrary. Where, as there, state court decisions are in fact followed, it is difficult to determine whether persuasive or binding effect is accorded to them.

The case of *Field v. Fidelity Union Trust Company,* 108 Fed. (2nd) 521, decided by the Circuit Court of Appeals for the Third Circuit at about the same time as this case, is in accord with it and contains an exhaustive review of the cases. Decisions by other courts squarely raising the question of the binding effect of decisions of lower state courts will undoubtedly be frequent, and this Court will have ample opportunity to settle the question in an appropriate case if it should feel the need to do so.

One more observation has importance, we submit, upon the consideration of this petition. Unless *no* inferior state court can bind the federal courts (on which hypothesis this case was rightly decided) considerable discrimination must be exercised in determining *which* inferior state courts can bind the federal courts. The exercise of this discrimination requires thorough study of the structure of the particular state judicial system. Circuit Judge Allen, who wrote the opinion in the Circuit Court of Appeals in this case, was formerly a judge of the Supreme Court of Ohio and has stated in the opinion cogent reasons of state court practice for her decision, the principal one being that the decision of the Court of Appeals for one county does not make state law. (R. 140.) We submit that this case has

correctly decided the question for the State of Ohio, even though in some other states the decisions of intermediate appellate courts might be binding upon the federal courts. In this aspect the case is one of largely local concern and no review is necessary.

CONCLUSION.

The questions presented in this case are not of public interest, nor do they present any legal novelty. The sole question of federal law was only an alternative holding and the only point upon which the Circuit Court of Appeals was unanimous was that petitioners were guilty of laches. The binding effect of decisions of lower state courts has been the subject of many decisions, including those of this Court, and the proper rule is clear.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 44 and 45.

CHARLES PEYTON WEST, and
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AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
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ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS,
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BRIEF OF THE RESPONDENT.

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OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 108 Fed. (2) 347 and is contained in the record beginning at page 136. The opinion of the District Court is not reported but is contained in the record beginning at page 116.

STATEMENT OF THE CASE.

A sufficient general statement of facts is made in the plaintiffs'* brief. Such additional facts as need be referred to will be stated in connection with particular arguments.

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*Since this is the sixth court to hear this case it will avoid confusion to refer to the petitioners as "plaintiffs" throughout, and to the respondent as "defendant."

SUMMARY OF ARGUMENT.

The judgment in the Circuit Court of Appeals in favor of the defendant is supported upon four separate and wholly independent grounds, none of which rests solely upon that court's application of the doctrine of *Erie Railroad v. Tompkins,* 304 U. S. 64 (1938).

These grounds are:

I. The defendant was not negligent in transferring its stock to the life tenant without limitation. Such a transfer was in accordance with the well settled law and practice in Ohio that, in the absence of objection by the remaindermen or restriction by the will or the court, a life tenant is entitled to distribution and the full possession and enjoyment of cash, bonds, stocks and other personal property. The Circuit Court of Appeals in its opinion ignored this settled law of Ohio and held the transfer was wrongful.

II. The action was barred by the statute of limitations. The first transfer occurred in February, 1927 and the second in November, 1929. Plaintiffs' action in the state courts was filed in June, 1934. Demand was made in June, 1937, and this suit filed in July, 1937. The Circuit Court of Appeals correctly held that the applicable Ohio statute of limitations is four years and that the plaintiffs' action was barred on either of two alternative grounds: (a) since the rule of *Erie Railroad v. Tompkins* did not require it to follow the ruling of the Ohio Court of Appeals as to the necessity of a demand in this case, the statute began to run upon wrongful transfer in 1927, and (b) that if demand were necessary to the cause of action, as the Ohio Court of Appeals held, the plaintiffs could not indefinitely postpone the making of that demand and thus nullify the statute of limitations; that a demand made after the expiration of the period of limitations was not seasonably made and was barred under well settled rules prevailing in Ohio and elsewhere.

III. The plaintiffs were guilty of laches. The Circuit Court of Appeals so held.

IV. This same controversy between these same parties was finally adjudicated by the final judgment rendered by the Ohio Court of Appeals. The Circuit Court of Appeals having disposed of this case on the grounds stated in II and III above found it unnecessary to pass upon this question.

V. The Circuit Court of Appeals was entirely correct in holding that it is not bound by the opinion of the Ohio Court of Appeals for these reasons: The opinion of the Ohio Court of Appeals was a misapplication of well settled Ohio law and a misconstruction of the decisions of the Supreme Court of Ohio and of a former decision of the Circuit Court of Appeals for the Sixth Circuit applying Ohio law. An Ohio Court of Appeals is not the highest court of the state. All its decisions are subject to review by the Supreme Court of Ohio. Its decisions are only binding on the Common Pleas Court of Cuyahoga County. They are not binding on the Common Pleas Courts in the other eighty-seven counties of Ohio or on the Courts of Appeals in the other eight districts of Ohio. The opinion of the Ohio Court of Appeals in this case cannot be accepted without denying full faith and credit to the judgment of that court in this same case since the opinion is inconsistent with the judgment.

VI. The plaintiffs' claims as to relief are based upon the common law doctrine that a life tenant of real estate, who by livery of seizin conveys a greater estate than he has, forfeits his life estate and the remainder is accelerated. This doctrine has never had any application in Ohio as to real estate and has never had any application anywhere as to personal propert. If the doctrine were recognized in this case the effect would be the enforcement of a forfeiture by a court of equity.

ARGUMENT.

I.

THE DEFENDANT WAS NOT NEGLIGENT IN TRANSFERRING ITS STOCK TO GRACE C. WEST WITHOUT LIMITATION.

Liability in this case is predicated on the claim that the defendant was negligent in permitting the transfer of shares of its stock from the estate of the father to the stepmother, a life tenant, without noting on the certificate a limitation of her interest. This transfer was made February 2, 1927, on the authority of assignments and other papers that will be discussed later. In November, 1929, the stepmother assigned her certificate to Paine Webber & Co., her brokers, who were purchasers for value, and upon the assignee tendering the endorsed certificate to the defendant a new certificate was issued upon the assignee's order (R. 47).

There was, of course, nothing negligent or wrongful about the second transfer. Had the defendant refused to issue the new certificate upon surrender of the old certificate properly endorsed it would have been liable to the assignee for conversion under the Uniform Stock Transfer Act. *Finance Company v. Booth,* 111 O. S. 361 (1924). Plainly, therefore, the second transfer was not the proximate cause of any injury to the plaintiffs. Judge Lurton pointed this out in a very careful opinion in *Smith v. Nashville & D. R. Co.,* 91 Tenn. 221, 18 S. W. 546 (1892). The only transfer, therefore, to be considered in determining the defendant's liability is that of 1927.

To understand the procedure in the Probate Court of Cuyahoga County, which preceded the 1927 transfer, it is necessary to state the settled law and practice in Ohio in the administration of estates where a legatee of personal property is given a life estate with remainder over to other persons.

In 1932 the Legislature of Ohio enacted a Probate Code which correctly declared the law and practice existing prior

to that date as to the right of a life tenant to distribution of personal property. The pertinent provision is as follows:

> "G. C. §10509-185. When by a last will and testament the use or income of personal property is given to a person for a term of years or for life, and some other person has an interest in such property as remainderman, the court, unless such last will and testament otherwise provides, shall have authority to deliver such personal property to the person having the limited estate, with or without bond, as the court may determine; or the court may in its discretion order that such property be held by the executor or some other trustee, with or without bond, for the benefit of the person having the limited estate. If bond is required of the person having the limited estate, or of the trustee, it may be increased or decreased, and if bond is not required in the first instance it may be required, at any time prior to the termination of the limited estate, at the discretion of the court."

It will be noted that a life tenant of personal property whether it consists of cash, notes, bonds, stocks or tangible personal property, unless the will otherwise provides or the Court otherwise directs, is entitled to complete distribution, possession and control of that property. The remainderman is protected by authority vested in the Court to require a bond of the life tenant or to appoint a trustee of the property during the life of the life tenant. This Code certainly clarified and perhaps extended the powers of the Court in such case, a matter in which we are not presently interested.

As to distribution to the life tenant the statute declared the settled law and practice in Ohio prior to the adoption of the Probate Code is shown by the following, among other cases: *Ratliff v. Warner,* 32 O. S. 334 (1877); *Lapham v. Martin,* 33 O. S. 99 (1877); *Martin v. Lapham,* 38 O. S. 538 (1883); *Flickinger v. Saum,* 40 O. S. 591 (1884); *Posegate v. South,* 46 O. S. 391 (1889); *Johnson v. Johnson,* 51 O. S. 446 (1894); *Wilson v. Wilson,* 21 O. L. A. 137 (Court of Appeals of Monroe County, 1935);

Blume v. Thompson, 15 O. N. P. (N. S.) 97 (1913); *Ohio Savings Bank & Trust Company v. Clark*, 7 O. App. 6 (1916).*

Some of these cases were executory limitations of personal property and some were life estates with or without power in the life tenant to consume. In all cases the rule was the same, that the life tenant or first taker was entitled to distribution of the personal property and the executor was fully discharged by making it. In the last case above cited the estate consisted largely of stocks and the widow to whom distribution was ordered had only a life estate with remainder over to other persons.

We now turn to the circumstances under which the defendant made the transfer of February, 1927. When time came for distribution Grace C. West as executrix filed an application in the Probate Court of Cuyahoga County reciting that the debts of the estate had been paid, that there were in the estate certain stocks, including 92 shares of the defendant's stock, and that by the terms of the last will and testament these stocks were bequeathed to her for life. The prayer was—

> "Your applicant therefore asks the court to transfer said stocks to her, the within named Grace C. West." (R. 67.)

The plaintiffs signed a written consent to that application in the following language:

> "We the undersigned, Charles P. West, Jr., and Maurice J. West, hereby consent to the foregoing distribution in kind." (R. 67.)

Having in mind the settled law and practice in Ohio as above discussed the recitals of this application entitled Grace C. West to complete possession and control of the

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* In the plaintiffs' brief in the court below, p. 9, it was said:

> "A life tenant is entitled to possession; therefore it was the duty of the probate court to approve distribution in kind to her, and the duty of the remaindermen to consent to it.
>
> "*Flickinger v. Saum* (1884) 40 O. S. 591;
> *Posegate v. South* (1889) 46 O. S. 391."

personal property. Neither the prayer of the application nor the consent of these plaintiffs suggests any limitation upon her estate. The plaintiffs might have asked the court to appoint a trustee or require a bond. Also they might have refused consent unless the court gave express instructions to transfer the stocks to Grace C. West for life and to note on its records the interest of the plaintiffs in the remainder. They did none of these things but instead consented to the distribution as prayed.

Acting upon this application the Probate Court the same day made an order of distribution as to these stocks including that in the defendant which, after reciting the substance of the application, the terms of the will and the consent of the plaintiffs as next of kin, ordered as follows:

> "Wherefore said application is granted, and it is by the Court ordered that said applicant, Grace C. West, be and she is hereby authorized and directed to distribute in kind and transfer unto herself as the widow of said Charles P. West, deceased, and the distributee entitled thereto, the aforesaid stocks, as prayed for." (R. 68.)

That order is not ambiguous. It names Grace C. West as the distributee entitled to distribution of the stocks in accordance with the settled law of Ohio.

On February 2, 1927, the defendant received from Grace C. West as executrix the following papers: (1) certificates for 92 shares of its common stock, each duly assigned to Grace C. West (R. 46, 49); (2) certificate of Grace C. West's appointment as executrix (R. 47, 65); (3) a certified copy of the will (R. 47, 65-6); (4) a certified copy of the application for distribution containing the plaintiff's consent (R. 47, 66-7); and (5) certified copy of the journal entry of the Probate Court of Cuyahoga County ordering distribution (R. 47, 67-8). Accordingly the defendant issued a new certificate for 92 shares to Grace C. West without limitation.

There is no claim that the defendant did not know from these papers that Grace C. West was given only a life estate

by the will. The will clearly so stated and both the application and order of distribution so recited. It *is* claimed that under the settled law of Ohio in the absence of restriction in the will or objection by the remaindermen or the Court Grace C. West as life tenant was entitled to have the stock registered in her name without limitation just as she also took title to money, notes and other personal property (R. 32-3).

It will be noted that the Probate Court in its order took precisely the same view of Grace C. West's rights and the plaintiffs' consent thereto as did this defendant. Both, we submit, under the well settled law of Ohio were justified in so doing and there was no negligence of any kind on the part of the defendant.

Under the law of Ohio if an executor had turned over to Grace C. West under precisely similar conditions negotiable bonds or moneys the executor would have been under no liability to the remaindermen. By what reasoning is it held that this defendant owed a greater duty to these plaintiffs than did the executor? Or by what reasoning is it held that the defendant owed a duty to the plaintiffs to protect them against their own failure to require either a bond or a trustee or a modification of the order of distribution.

Both lower courts ignored the settled law and practice in Ohio on the theory that the application for distribution to which the plaintiffs consented was merely a distribution in kind instead of in cash as provided by Ohio General Code Section 10839.* Where an executor in Ohio is author-

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* "Sec. 10839. An executor or administrator who has paid all the debts of an estate, but has in his possession notes, bonds, stocks, claims, or other rights in action, belonging thereto, with the approval of the probate court entered on its journal, and the assent and agreement of the persons entitled to the proceeds of such assets as distributees, including executors, trustees and guardians, may distribute and pay these over in kind to those of such distributees as will receive them."

ized to sell the assets of an estate and make distribution in cash that section provides that if he wants to make distribution in kind he must have the consent "of the persons entitled to the proceeds of such assets as distributees." This, of course, was not that kind of a case. The Executor had no authority to convert the estate into cash. All the property was left to Mrs. West for life with remainder to these plaintiffs. This has many times been held to have the effect of a specific legacy. There was no necessity, therefore, for any consent to a distribution in kind instead of in cash for the will contemplated only a distribution in kind.

Moreover we suggest that this defendant would not have been guilty of negligence if there had been no consent by the plaintiffs. In other words, if the order for distribution had been made on the basis of an application after mere notice to the plaintiffs the result would have been precisely the same because under the settled law of Ohio Mrs. West was entitled to the distribution of all personal property in the absence of objection by the remaindermen or a restriction imposed upon her either by the will or the court.

The District Judge further suggests that the order of distribution in the Probate Court in this case could not change the rights of the parties as fixed by the will in accordance with well settled Ohio cases such as *Swearingen v. Morris,* 14 O. S. 424 (1863) and *Armstrong v. Grandis,* 39 O. S. 368 (1883). Those are cases in which an improper distribution of the estate is made by the order of distribution. For one reason or another persons not entitled to distribution receive it. In such cases it has been held that the order of distribution is not conclusive. However, that is not this case. Mrs. West was entitled to distribution. Under similar circumstances it has been repeatedly held, as we have noted, that an Ohio executor distributing personal property to a life tenant makes a proper distribution and cannot later be charged with the loss of the estate in the hands of the life tenant. Both G. C. Section 10839 and the Ohio cases referred to by the District Judge are wholly beside the point.

Plainly under the settled law of Ohio Mrs. West was entitled to receive complete distribution of all personal property. The Probate Court so ordered without objection from the remaindermen. The defendant in recognizing this settled Ohio law and practice was not guilty of any negligence and the judgment below should be sustained on this sole ground.

II.

THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

The statute of limitations in this case began to run when the alleged wrongful transfer was made in 1927. This is true whether or not the doctrine of *Erie Railroad v. Tompkins, supra,* requires the federal courts to hold that a demand in this case was necessary. The general rule and the rule in Ohio here applicable is that if the plaintiffs must make a demand before maintaining their action they cannot indefinitely toll the statute of limitations by mere failure to make that demand; that the demand must be seasonably made, and that if it is not made within the period fixed by the statute of limitations it comes too late.

In *Douglas v. Corry,* 46 O. S. 349 (1889), an action was brought against an attorney alleged to have collected money for a client for failing to pay it over. The petition did not allege any misrepresentation or concealment by the attorney. It alleged that he had collected some money in 1867 and more in 1871 and that a necessary demand upon him had been made in 1880. This suit was brought in 1886, within six years after the demand. The statute of limitations applicable to such cases is six years. The demand, therefore, was not made within the period of the statute although the suit was brought within the period of the statute after demand. The court held that the action was barred, saying in the opinion, page 352:

"It is true that it is generally held that an action cannot be commenced against an attorney for money

> collected until a demand has been made by the client. * * *. The client has it in his power, by making the demand, to commence the action at any time after the attorney has received the money and refused on demand to pay it over; and, by delaying the demand, he cannot prevent the running of the statute."

In *Townsend v. Eichelberger,* 51 O. S. 213 (1894), a case where a demand was held to be necessary but was not made within the period of the statute, the court thus stated the law in its second syllabus:

> "* * * where there are no circumstances of fraud or concealment on his part, the statute of limitations begins to run from the time it was his duty on demand to pay it to the parties entitled to it."

The same principle was applied to an action by a stockholder for dividends in *Stearns v. Hibben Dry Goods Company,* 11 O. C. C. (N. S.) 553 (1909), affirmed without opinion 84 O. S. 470 (1911).

In accordance with this principle the Circuit Court of Appeals in its opinion below (R. 142) said:

> "But assuming that demand and refusal are necessary to the accrual of this action, it is the law that when some preliminary action is a prerequisite to the bringing of the suit, and such action rests with the claimant to perform, he cannot defeat the operation of the statute by failure to act or by long and unnecessary delay. Otherwise he would have it in his power to defeat the purpose of the statute. *Atchison, Topeka & Santa Fe Rd. Co. v. Burlingame Tp.,* 36 Kan. 628; *Palmer v. Palmer,* 36 Mich. 487; *Oleson v. Wilson,* 20 Mont. 544; *Winchester & Lexington Turnpike Co. v. Wickliffe's Admr.,* 100 Ky. 531; *Barnes v. Glide,* 117 Cal. 1. Cf. *Bauserman v. Blunt,* 147 U. S. 647; *United States v. Sligh,* 24 Fed. (2d) 636. This is also the law in Ohio (*Keithler v. Foster,* 22 Ohio St. 27). The demand under such circumstances is not to be delayed beyond the period of the statute, which in this case is four years."

We shall show later in this brief that the rule of *Erie Railroad v. Tompkins* does not require the federal courts

to hold that any demand was necessary here, in which event the cause of action clearly accrued in 1927.

Under any theory, therefore, the statute of limitations started to run in 1927 and seven years elapsed before the plaintiffs brought suit in the state courts and ten years before they made any demand or brought suit in the federal courts. The applicable statute of limitations in Ohio is four years.

This is an action in equity. An action for damages at law was brought in the state court and might again have been brought here. It is, of course, well settled that where equity has concurrent jurisdiction with the law the legal statute of limitations is applied in equity. See *Russell v. Todd*, 309 U. S. 280 at 289 (1940); *Metropolitan Bank v. St. Louis Dispatch Company*, 149 U. S. 436 at 448 (1893); *Longworth v. Hunt*, 11 O. S. 194 at 201 (1860); *Seeds v. Seeds*, 116 O. S. 144 at 152 (1927); *Keys v. Leopold*, 214 N. Y. 189 (1925). A leading case on this subject involving an improper transfer of stock is *Casper v. Manufacturing Company*, 159 Wis. 517 (1914).

The Circuit Court of Appeals held that an action by remaindermen for injury to the remainder falls within paragraph 4 of Ohio G. C. 11224. The entire section reads as follows:

> "§ 11224. *Four years; certain torts.*—
>
> An action for either of the following causes, shall be brought within four years after the cause thereof accrued:
>
> 1. For trespassing on real property;
>
> 2. For the recovery of personal property, or for taking or detaining it;
>
> 3. For relief on the ground of fraud;
>
> 4. For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated.
>
> If the action be for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the

wrongdoer is discovered; nor, if it be for fraud, until the fraud is discovered."

It will be noted that whether this action falls within paragraph 2 or paragraph 4 is wholly immaterial so far as length of time is concerned. The four year limitation applicable to both expired long prior to either suit or demand. This is also true if the statute started to run with the second transfer in 1929.

To avoid having their action barred the plaintiffs have heretofore always claimed that their action came within paragraph 2; that it was an action for the "taking of personal property"; that they did not "discover the wrongdoer" until 1934, and that in consequence they came within the savings clause of the statute. They now further claim for the first time that the action in this case is not a tort action but an action *ex contractu* and that in consequence this whole section is not applicable but that other sections with limitations of either 6 or 15 years are applicable (Plaintiffs' brief, pp. 23-25). We shall discuss each of these contentions.

The Circuit Court of Appeals in this case held:

"Plaintiffs claim that this is an action for the recovery of personal property or for taking or detaining it, and that the cause did not accrue until the wrongdoer was discovered. If paragraph 2 were the controlling provision, the saving clause would not aid the plaintiffs here, for the principal wrongdoer might easily have been discovered in 1930, when Maurice John West was informed that some of the estate stocks had been sold, and under the statute notice sufficient to put the claimant upon inquiry is equivalent to discovery. 19 *Ohio Jur.*, p. 462. But paragraph 2 is not applicable. The remaindermen have no right of possession so long as the life estate exists. The injury which they have suffered is an injury to their right of remainder. The applicable provision is paragraph 4, 'For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated,' which carries

with it no saving clause, and the action is barred under the statute." (R. 141.)

It thus held (1) that the plaintiffs did not bring themselves within the savings clause of paragraph 2 and (2) that paragraph 4 is the applicable one and it has no savings clause. Perhaps the reasons for these holdings should be more fully stated.

Prior to the adoption of a Code of Civil Procedure in Ohio in 1851 the statute of limitations named the common law actions such as trover, replevin, etc. When common law actions were abolished the statute of limitations had to be changed. In consequence we find in paragraph 2 of G. C. 11224 in place of replevin the phrase "recovery of personal property," in place of trover the "taking of personal property" and in place of detinue the "detaining of personal property." Compare *Chase's Statutes of Ohio,* Vol. III, p. 1768 (1835) with 51 O. L. 57, Sec. 15.

It was, of course, well settled at common law that to maintain trover the plaintiff must be entitled to immediate possession. Trover could not be brought by a remainderman or by a mortgagee before breach. Their remedy was a special action on the case which is included in the general description of paragraph 4 of G. C. 11224. It was early held in Ohio in *Allison v. McCune,* 15 Ohio Rep. 726 (1846), that a mortgagee who had no immediate right to possession necessary to maintain an action of trover could nevertheless maintain a special action on the case against one lessening the mortgage security by removing machinery and other fixtures from the mortgaged property. This was also the principle applied by the Kentucky Court in *Coffey v. Wilkerson,* 58 Ky. 101 (1858) and *Yeager v. Bank,* 127 Ky. 751 (1908), cited in plaintiffs' brief, pages 30 and 31. It follows, as the Circuit Court of Appeals held, that this action by remaindermen falls not under paragraph 2 but under paragraph 4 for which there is no savings clause.

However, even the savings clause for paragraph 2 does not aid the plaintiffs. They alleged in their petition

and attempted to prove no more than that they "had no knowledge of said wrongful acts of the defendant and of Grace C. West until March, 1934" (R. 23). They did not allege any acts on the part of the plaintiffs to inform themselves as to the record title of the shares. They did not allege any acts on the part of the defendant which prevented the plaintiffs from acquiring full knowledge. They did not allege any concealment or other conduct by the defendant that in any way misled, hindered or prevented the plaintiffs from acquiring full knowledge. On the trial Maurice J. West admitted that he was told in June of 1930 by Mrs. West's sister, with whom she was then living, that Mrs. West "had suffered great losses in the stock market" and that "our securities" might be gone (R. 30). However, they made no inquiry of the defendant until March, 1934, when the defendant promptly and fully answered their inquiry (R. 101).

Both by pleading and evidence they thus rely upon mere want of knowledge not induced by any act of the defendant to bring them within the savings clause of the statute. This in Ohio is not sufficient.

In *Foster v. Mansfield etc. R. R. Co.*, 146 U. S. 88 (1892), Mr. Justice Brown made a very wise and applicable observation at page 99:

> "The defence of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

A statement that has been often quoted appears in *State ex rel. v. Standard Oil Company*, 49 O. S. 137 (1892), at page 188, as follows:

> "It is further contended that the provision does not apply by reason of the fact, as averred in the peti-

> tion, 'that the plaintiff had no knowledge of the existence of either of the aforesaid agreements, or of the acts hereinbefore recited, until the latter part of the year 1889.' *The general rule is that a party's want of knowledge does not prevent the running of the statute of limitations against an action that has accrued in his favor; and the only exception is concealment or fraud on the part of the defendant,* which is expressly confined by our statute to 'an action for relief on the ground of fraud.' § 4982 Revised Statutes. This is not such an action; and fraud in fact is not averred, it is simply want of knowledge on the part of the plaintiff." (Italics supplied.)

Section 4982 Revised Statutes is now G. C. 11224.

Very recently in *State ex rel. v. Industrial Commission,* 130 O. S. 185 (1935), it was held, syllabus 3:

> "A claimant's lack of knowledge of facts giving rise to a right of action or a claim for compensation does not prevent the running of the statute or postpone the commencement of the period of limitation; and the statute is not tolled by the failure of an employer to disclose facts within his knowledge which would support a claim against him."

The Court of Appeals of Cuyahoga County has recently applied the foregoing principles to the very provision of G. C. 11224 now under consideration. The Court said in *Klein v. Linn,* 10 O. L. Ab. 560 (1931), at 561:

> "Under Sec. 11224 G. C. an action for recovery of personal property must be brought within four years after the cause thereof accrued.
>
> "A right of action in trover accrues at the time of conversion. It is immaterial whether the plaintiff knew of the conversion or not unless the fact of the conversion was fraudulently concealed from him."

The plaintiffs knew in 1927 that the entire estate had been delivered to the life tenant, Grace C. West. They knew that the only two persons in the world who could effect an improper transfer were Grace C. West and this

defendant—Grace C. West because she held the certificate and this defendant because it recorded transfers. To keep themselves fully apprised it was only necessary for these plaintiffs to inquire of one or the other or both. Had they merely addressed a letter to this defendant at any time prior to March, 1934, they could have ascertained the facts precisely as they did ascertain them by letter in March, 1934. Or had they at any time after 1927 examined the public records of the Probate Court they could have discovered the order of distribution.

"Failure to discover" implies "effort to discover." Mere want of knowledge without the slightest effort to discover what even casual inquiries would have revealed is not sufficient. In fact the law charges the plaintiffs with all the knowledge that reasonable vigilance would disclose. Certainly they have not brought themselves within the savings clause of the Ohio statute.

Finally, it is now claimed by the plaintiffs for the first time that this action is *ex contractu*. It is difficult to be patient with such an argument at this late date and particularly in view of the fact that in its present brief the plaintiffs repeatedly refer to the "tortious act" (p. 29), "conversion of the stock" (p. 29), "conversion by a life tenant" (p. 30), etc. Finally, at page 38, the plaintiffs say—

> "It (the defendant) thus becomes a participant in the life tenant's act of conversion."

The plain fact is that the wrong relied upon from the beginning is an alleged wrongful and negligent transfer of stock in 1927. The plaintiffs were not then and are not now stockholders of the defendant. They are not entitled to certificates, dividends or voting rights. There has been at no time a relation of corporation and stockholder. To cite cases holding that the relation between *stockholder* and a corporation is *ex contractu* is wholly beside the point.

On any theory the statute of limitations in this case has

long since run. The claim was barred in 1934 when the first action was brought in the State Court and was still barred in 1937 when the present demand was made and action brought.

III.

THIS ACTION IS BARRED BY LACHES.

That laches existed in this case is shown by a bare recital of the undisputed facts as follows:

Plaintiffs were respectively 28 and 30 years of age when their father died in 1926 (R. 122). Maurice J. West was at that time a third year law student. He was admitted to the Bar in August, 1927 (R. 23). He continued to live with his step-mother, Grace C. West, from the death of the father until September, 1928 (R. 23). He discussed family affairs with her and knew that she speculated in the market (R. 22-3).

He testified that when the application and order of distribution were made and consented to by him he knew that the securities would be transferred to his step-mother "in some form," but did not know that they would be transferred to her "without limitation" (R. 24). Asked if during the year and a half that he lived with his step-mother following the transfer he made any inquiry from her about the telephone stock he said:

> "Why, she told us she transferred it. At the time that transfer was made I stressed the point she should transfer it in some way it would be earmarked, although I supposed she did; she didn't say anything about it.
>
> * * * * *
>
> Q. What inquiry did you make of her as to whether that stock was transferred to her outright or to her for life? A. I didn't make any.
>
> Q. Did you ask to see the certificates? A. I did not.

Q. Did you ever hear about the certificates of the American Telephone & Telegraph stock, from 1927 to 1934? A. Yes.

Q. When? A. In 1930.

Q. Tell us about it, where were you? A. I was married and went on my honeymoon, went down to Boston. After I was there a while, my sister-in-law, or rather my aunt, Helen Spittler, mentioned to me about that Grace had suffered great losses in the stock market, and she thought some of our securities were gone, and so while I was there I asked Grace about it and I demanded to see the certificates and she refused to show them to me.

Q. What did you do about it after she refused to show them to you? A. I was a guest in her home, I didn't say anything more about it, until shortly after I left, I investigated." (R. 30.)

Helen Spittler and Grace C. West were sisters then living together in Boston. From his further testimony it developed that what he investigated in 1930 was not the stock of the Telephone Company but of another company and that until March, 1934, he addressed no inquiries of any kind to the Telephone Company.

Also in 1930 he investigated the Cuyahoga County Probate Court records but did it so carelessly that, he says, while he saw the application for distribution he did not see the order of distribution (R. 32).

But the definite warning that his securities were gone in 1930 was not the only warning that he had that some at least of the stocks of the estate had been transferred to Grace C. West without limitation. Included in the same order of distribution with the telephone stock were 32 shares of the preferred stock of The M. A. Hanna Company. In the fall of 1928 Grace C. West delivered certificates for 16 shares of the Hanna stock to each of the plaintiffs, a transfer she could only have made if she had theretofore had complete title in her name. Maurice J. West testified that it did "seem strange" to him that she could

transfer the Hanna stock to him outright (R. 29) but he made no inquiry about it or about the Telephone Company stock.

Grace C. West did not pledge the telephone stock with her broker until October 31, 1929 (R. 47). Had the plaintiffs in the nearly 3-year period from February 2, 1927 to October 31, 1929, spent the price of a postage stamp on a letter to the Telephone Company, or investigated the Probate Court records of Cuyahoga County with any care, they could have discovered all that they learned in March, 1934, and in time to have prevented any wrong by anyone. The plaintiffs' loss is due solely to their own lack of diligence.

We suggest that the conclusion of the Circuit Court of Appeals on these undisputed facts is sound:

> "Laches also exists and is fatal to recovery. A material consideration in this connection is the fact that the action is brought not against the life tenant, the principal tort feasor, but against the defendant, whose wrongdoing constitutes mere negligence, no concealment or fraud being charged. The family relationship might perhaps account for delay in making demand if the action were against the life tenant herself. But this relationship also suggests strong possibility of collusion, and does not excuse delay as to this defendant. Maurice John West's knowledge in 1930 that some of these stocks had been sold called for action. If inquiry had then been made, the defendant might have been able to enforce its remedy against the life tenant. Laches is not measured by the statute of limitations (*Alsop v. Riker,* 155 U. S. 448). But here the delay is longer than the period of the statute, and compels the conclusion that the plaintiffs failed within a reasonable time to assert their rights. Cf. *Liverpool & London & Globe Ins. Co. v. Crosby,* 83 Fed. (2d) 647 (C. C. A. 6)." (R. 142-3.)

IV.

THE PRESENT ACTION IS BARRED BY THE FINAL JUDGMENT OF THE OHIO COURT OF APPEALS.

The defendant pleaded fully and proved an adjudication in its favor by final judgment on the merits in the state courts. The parties, the pleadings, the issues and the evidence are all precisely the same in the two cases except for the immaterial allegations and proof as to a demand. As we later show demand was not necessary by the settled law of Ohio. The only statement to the contrary appears in the unfiled opinion of the Court of Appeals in the former case. Even if demand were necessary, the cause of action alleged and relied on in both cases was the transfer of 1927.

That the judgment was a final judgment on the merits admits of no doubt. It declared that:

> "* * * the judgment of the said Court of Common Pleas is reversed for reasons stated in opinion on file and final judgment is hereby rendered for appellant (defendant), * * *." (R. 114.)

That is the ordinary form of a final judgment on the merits. It was this *judgment* which the Supreme Court of Ohio refused to review, for, of course, it does not review opinions.

This judgment is unambiguous. It cannot be modified or changed by anything said in the Court's opinion whether that opinion is filed or unfiled.

As this Court has said in *Rogers v. Hill*, 289 U. S. 582 at 587 (1933), "The court's decision of a case is its *judgment* thereon. Its opinion is a statement of the reasons on which the judgment rests."

What the plaintiffs seek to do is to use the unfiled *opinion* of the Ohio Court of Appeals to show that when that Court entered final judgment for the defendant it did not mean to do so; that what it meant to do was to order the dismissal of the petition without prejudice because it was prematurely brought. The latter would have been the

proper order for the Court of Appeals to have made had it intended its judgment to reflect the views the plaintiffs claim it entertained. The plaintiffs thus seek to convert an unambiguous final judgment into a judgment of dismissal without prejudice although they gave the Ohio Court of Appeals no opportunity by a timely motion to decide whether it intended to do this or not.

The reasons why courts will not modify judgments in accordance with the views of the parties as to the meaning of opinions was never better stated than by Mr. Justice Day in *Deposit Bank v. Frankfort,* 191 U. S. 499 (1903), when he said, page 510:

> "When a plea of *res judicata* is interposed based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself, was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been

subsequently reversed, that it is any the less effective as an estoppel between the parties while in force."

The cases in Ohio are in entire accord with the federal rule. In *Kehm v. Insurance Company*, 11 O. C. C. (N. S.) 1 (1908), affirmed without opinion in 81 O. S. 563, a demurrer to the plaintiff's petition was sustained in the Court of Common Pleas and this order affirmed in the Circuit Court. When plaintiff brought a new action in the Court of Common Pleas the defendant pleaded the former judgment which was held by all the courts to be a bar although the opinion of the Circuit Court in the first case showed that it proceeded on a technical ground, namely, no consideration alleged in the petition.

The Circuit Court in the second case said at page 3:

> "The general principles of the law applicable to the question at bar seem to be well settled. If no error had been prosecuted to the judgment of the court of common pleas, the judgment of that court on the demurrer would be final and a bar to this action. This judgment was affirmed by the circuit court, and we think the finality of the judgment was not changed by the fact that looking to the opinion of the court, outside of the record of that case, the circuit court based its affirmation on technical grounds. The circuit court might have been wrong in its conclusion and still the judgment have been right, and if the case had gone to the supreme court the question there would have been, not whether the reasons given by the circuit court in its opinion were right, but whether on the record the judgment of affirmance was right. We think the judgment should be affirmed."

In view of these well settled principles the most that the plaintiffs can claim here, assuming that they are even entitled to refer to the unfiled opinion of the Ohio Court of Appeals, is that its judgment was erroneous on its own view of the law. It is a well settled part of the doctrine of *res judicata* that the fact that a judgment in the state

court between the same parties on the same cause is erroneous does not prevent its effectiveness as a bar to further litigation in the federal court. In *Rooker v. Fidelity Trust Company,* 263 U. S. 413 (1923), Mr. Justice Van Devanter said with reference to a state judgment, page 415:

> "If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. *Elliott v. Peirsol,* 1 Pet. 328, 340; *Thompson v. Tolmie,* 2 Pet. 157, 169; *Voorhees v. Bank of United States,* 10 Pet. 449, 474; *Cornett v. Williams,* 20 Wall. 226, 249; *Ex parte Harding,* 120 U. S. 782."

More recently, in *Reed v. Allen,* 286 U. S. 191 (1932), a case of great hardship, Mr. Justice Sutherland said, at page 201:

> "These decisions constitute applications of the general and well settled rule that a judgment, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided, whether the decision be right or wrong. *Cornett v. Williams,* 20 Wall. 226, 249-250; *Wilson's Executor v. Deen,* 121 U. S. 525, 534; *Chicago, R. I. & P. Ry. v. Schendel,* 270 U. S. 611, 617. The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert."

Plainly the judgment rendered in the state court is a bar to the present action. On this point the Circuit Court of Appeals below did not pass, saying—

> "As plaintiffs' bill was not timely filed, it is unnecessary to consider the question of *res judicata,* also relied upon by defendant." (R. 143.)

V.

THE QUESTION OF THE APPLICABILITY OF ERIE RAILROAD v. TOMPKINS.

The Circuit Court of Appeals discussed the rule of *Erie Railroad v. Tompkins* as an alternative basis for refuting plaintiffs' argument on the statute of limitations. That is, it said that since it was not required to follow the opinion of the Ohio Court of Appeals that a demand was necessary, it would hold that a demand was not necessary and that the cause of action arose in 1927 and was barred by the statute of limitations. Alternatively it held, as we have seen, that the same thing would be true if it had held that a demand were necessary.

The plaintiffs, however, go much further. They seek to avoid not only the defense of the statute of limitations but the defenses of laches and *res adjudicata* on the ground that the federal courts are bound to follow the decision of the Ohio Court of Appeals; that under this decision no cause of action arose until a demand was made and refused in 1937, and that the cause of action which then arose was a different one from that decided by the Ohio Court of Appeals.

Before any discussion of the rule of *Erie Railroad v. Tompkins* and its applicability here it is necessary to state (1) the settled law of Ohio as to the necessity of a demand as it stood prior to the opinion of the Ohio Court of Appeals, and (2) the misapplication of well settled Ohio law in the opinion of the Ohio Court of Appeals.

A. The Settled Law of Ohio as to Demand Prior to the Decision of the Ohio Court of Appeals.

The plaintiffs sue for a destruction of their remainder while the life tenant is alive. As remaindermen the plaintiffs have no right to a certificate of stock or to dividends or to voting rights. If they have no right to these things, obviously they have no right to demand any of these things.

It follows that if their rights of future enjoyment were destroyed, as they claim, by the acts of the defendant in 1927 and 1929 they had a right to bring an immediate action for that purpose without any demand. In the following cases cited in the plaintiffs' brief, all but one of which are for the negligent transfer of stock, no demand preceded the filing of the petition. *Coffey v. Wilkerson,* 58 Ky. 101 (1858) (Plaintiffs' brief, p. 30); *Yeager v. Bank,* 127 Ky. 751 (1908) (Plaintiffs' brief, p. 31); *Allen v. The Insurance Company,* 10 Oh. Dec. Repr. 204 (1894) (affirmed without opinion, 52 O. S. 622) (Plaintiffs' brief, pp. 31, 42, 43); *Loring v. Salisburg Mills,* 125 Mass. 138 (1878) (Plaintiffs' brief, p. 36); *Lowry v. Bank,* Fed. Cases No. 8,581 (1848) (Plaintiffs' brief, pp. 38, 40); *Baker v. Atlantic Coast Line Railroad,* 173 N. E. 365 (1917) (Plaintiffs' brief, pp. 22, 39). These cases recognize that where a plaintiff's remainder in stock has been destroyed by a corporation's negligence in permitting a fiduciary to improperly dispose of the stock the plaintiff may immediately bring suit for the destruction of his remainder.

The cases on this point that have heretofore been decided by the Supreme Court of Ohio are cases between a stockholder and a corporation. The leading case is *Cleveland & Mahoning Railroad Company v. Robbins,* 35 O. S. 483 (1880). Here a stockholder of the Railroad Company sold his shares and delivered the endorsed certificate to the purchaser. The purchaser mislaid it for many years and never had it transferred to his name on the books of the company. Thus the corporation did not know he was a stockholder. In the meantime the record holder of the shares represented to the corporation that he had lost his certificate and by giving bond secured a duplicate certificate upon which dividends were subsequently declared and paid. After the death of the original purchaser his executor found his old certificate duly endorsed by the original record holder and made demand upon the corporation to issue a new certificate and account for dividends pre-

viously paid to others. This demand was refused, suit was brought and the corporation pleaded among other things the statute of limitations. The Court held that under such circumstances the corporation was without fault and had committed no wrong until it received notice, through a demand, of the rights of the original purchaser whose rights were not disclosed by its records. It held that until the corporation refused to transfer the shares upon presentation of the old certificate it had committed no wrong and no cause of action arose; that the statute of limitations did not begin to run until demand was refused, and that the corporation was not liable for dividends paid before it knew of the purchaser's interest.

This same principle has been applied in Ohio to similar situations in the following cases: *Steverding v. Cleveland Co-operative Stove Company,* 121 O. S. 250 (1929); *Pure Oil Company v. Hunt,* 40 O. App. 329 (1931); *American Steel Foundries v. Hunt,* 79 Fed. (2d) 558 (C. C. A. 6, 1935).

The principle of these decisions is that the purchaser and assignee of corporate stock is the owner thereof even though the corporation does not know of his ownership but that the corporation commits no actionable wrong against him by treating the record owner as the stockholder until the real owner has advised the corporation of his rights by a demand either to transfer his stock or pay him dividends or accord him voting rights. The refusal of the demand is the first wrongful act.

The plain implication of these decisions is that where the corporation has full notice of the rights of stockholder or remaindermen and injures or destroys those rights by the negligent act of its agents no demand is necessary to the cause of action. The claim here is that the corporation was fully advised of the plaintiffs' rights in 1927 through a copy of the will of their father and other documents. If the defendant committed any wrong it was committed when it made the transfer, as the plaintiffs claim.

The refusal of the demand added nothing to the cause of action nor is it the cause of action alleged.

In the *American Steel Foundries* case, *supra,* a case from Ohio, Judge Hicks in his opinion mentioned three classes of cases for the conversion of stock in the first two of which no demand was necessary and in the third of which, cases of the type of the *Robbins* case, *supra,* he held a demand to be necessary. At 79 F. (2) page 561 he said:

> "There are of course many circumstances under which trover will lie for the conversion of corporate shares such as (1) where a transfer upon the books passes title by virtue of the by-laws or regulations of the company or of some particular statute (*Cornick v. Richards,* 3 Lea (Tenn.) 1; *Leurey v. Bank of Baton Rouge,* 131 La. 30, 38, 58 So. 1022, Ann. Cas. 1913E, 1168); (2) where the transfer was brought about by the negligence of corporate agents; and (3) where the corporation by some overt or positive act and in violation of its trusteeship repudiated the shareholder's ownership and acted in hostility thereto. The third class is illustrated by *Cleveland & M. R. Co. v. Robbins, Adm'r.,* 35 Ohio St. 483, where after the issuance of the replacement certificates there was a demand by the rightful owner of the shares for the restoration of his rights followed by a specific denial. See, also, *First Nat. Bank v. Lanier,* 11 Wall. 369, 20 L. Ed. 172; *MacDonnell v. Buffalo Loan, Trust & Safe Dep. Co.,* 193 N. Y. 92, 85 N. E. 801. Here there was neither allegation nor evidence of demand and refusal, nor evidence of any positive repudiation of appellee's ownership. See *Pure Oil Co. v. Hunt,* 46 Ohio App. 329, 188 N. E. 738."

Both by decisions of the Supreme Court of Ohio and of the United States Circuit Court of Appeals for the Sixth Circuit applying Ohio law the settled rule was that a demand was not necessary in an action for conversion of corporate stock through the negligent act of corporate agents in making a transfer but was only necessary where the corporation committed no wrong against the stock-

holder until it refused his proper demand. The law of Ohio is thus settled by the decisions of its highest court and under *Erie Railroad v. Tompkins* no reference to lower court decisions is necessary or proper.

B. The Opinion of the Ohio Court of Appeals is a Misapplication of Well Settled Ohio Law.

The plaintiffs' first suit was filed in 1934 in the Common Pleas Court of Cuyahoga County. It was a law action seeking damages on account of the alleged wrongful transfers effected in 1927 and 1929. A jury having been waived the Common Pleas Court entered judgment for the plaintiffs for the full amount of their claim.

The defendant prosecuted error to the Court of Appeals whose territorial jurisdiction is coextensive with Cuyahoga County. That court, after hearing, entered final judgment declaring that:

> "the judgment of the said Court of Common Pleas is reversed for reasons stated in opinion on file and final judgment is hereby rendered for appellant (defendant)." (R. 114.)
>
> Actually, "no opinion of the Court of Appeals was filed with the record of said cause, although copies of such an opinion were furnished by the Court to counsel of record." (R. 113.)

In this unfiled opinion (R. 71 *et seq.*) the court said (1) that the defendant had made a negligent transfer, (2) that there was no estoppel against the plaintiffs, (3) that the conveyance of absolute ownership in the stock by the life tenant in 1929 did not forfeit her life estate to the remaindermen, and (4) that the plaintiffs could not maintain this action because no demand on the defendant had been made.

In support of its holding that a demand in this case was necessary, a question that had neither been briefed nor argued by counsel on either side, the Ohio Court of Appeals relied principally on the Ohio cases of *Railway Company v.*

Robbins, supra, Pure Oil Company v. Hunt, Receiver, supra, and *American Steel Foundries v. Hunt, supra.*

The opinion of the Ohio Court of Appeals which is now claimed to be binding upon the federal courts thus took a perfectly well settled proposition of Ohio law and applied it to a situation in which it has never been applied in this state and to which, on the theory of the leading cases, it is not applicable. It is plainly a misconception of the settled decisions of Ohio and specifically, as Judge Allen held, of a former decision of the Sixth Circuit Court of Appeals applying Ohio law. By insisting upon the applicability of *Erie Railroad v. Tompkins* the plaintiffs seek to fasten upon the law of Ohio a complete misconstruction by one Ohio Court of Appeals of a principle upon which the highest court of the state and all other courts have been agreed for a long time. As Judge Allen pointed out (R. 140):

> "If the judgment of the state court of appeals is binding here, we have the anomalous situation of an intermediate appellate court in Ohio misconstruing a decision of this court (*American Steel Foundries v. Hunt, supra*), and a District Court upon authority of the inferior appellate court's misconstruction, making the same error, and this court following the same erroneous holding."

Judge Allen might have added that this opinion was also a misconstruction of the *Robbins* case and other Ohio Supreme Court decisions.

The statement in the plaintiffs' brief, page 17, that the refusal of the Ohio Supreme Court to grant the plaintiffs' motion to certify this case for its decision "is in some degree an approval of the decision" of the Ohio Court of Appeals is wholly unwarranted if by that it is meant an approval of the opinion. The Supreme Court, of course, reviews a judgment and not the reasons for a judgment expressed in an opinion. In this case it found a judgment in favor of the defendant and if there is any inference of approval to be drawn from denial of the motion to certify it is

that the judgment was right either because the defendant was not guilty of negligence or because the action was barred by the statute of limitations, or other reason.

C. The Opinion of the Ohio Court of Appeals is Not Binding on the Federal Courts.

We are now in a position to summarize the many reasons why the opinion of the Ohio Court of Appeals in this case should not be considered binding on the federal courts.

1. The rule of Erie Railroad v. Tompkins and other decisions of this Court is that the law of a state must be established by its Legislature or by its highest court.

In *Erie Railroad Company v. Tompkins,* 304 U. S. 64 (1938), at page 78, in *Lyons v. Mutual Benefit Health & Accident Association,* 305 U. S. 484 (1939), at pages 489-490, and in *Wichita Royalty Company v. City National Bank of Wichita Falls,* 306 U. S. 103 (1939), at page 107, this Court held it to be the duty of the Federal Court to apply the law of the state as declared by its "highest court."

In *Russell v. Todd,* 309 U. S. 280 (1940), at page 293, Mr. Justice Stone said:

> "In the absence of a definitive ruling by the highest court of the state, we accept the decision of the Appellate Division and the reasoning of the Court of Appeals upon which it rests as persuasive * * *."

These cases establish the rule of binding authority for the decisions of the highest court of a state and a persuasive authority only for the decisions of inferior state courts.

This has been the interpretation of the decisions of this Court not only by the Sixth Circuit in the instant case but by other Circuits. *Six Companies v. Joint Highway District No. 13 of California,* 110 Fed. (2d) 620 (C. C. A. 9, 1940); *Field v. Fidelity Union Trust Company,* 108 Fed.

(2d) 521 (C. C. A, 3, 1939) (lower court decisions not binding and not followed); *Hack v. American Surety Company,* 96 Fed. (2d) 939 (C. C. A. 7, 1938) (lower court decision persuasive and followed).

Prior to the decision in *Erie Railroad v. Tompkins,* when the Rules of Decision Act was interpreted as not applying to matters of general common law, the same situation prevailed. One of the most important cases in this period was *Erie Railroad v. Hilt,* 247 U. S. 97 (1918). The critical part of the opinion is the following statement of Mr. Justice Holmes, referring to the New Jersey Supreme Court:

> "In view of the importance of that tribunal in New Jersey, although not the highest Court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decisions more doubtful than we do." (p. 99.)

The balance of the opinion shows that Mr. Justice Holmes approved of the decision of the New Jersey court. The statement above quoted demonstrates only that even if he had not fully approved of it he would have followed it in the interest of harmony and comity. Justice Holmes certainly does not say he would have followed the state court decision even though he found it erroneous.

The decision in *Graham v. White-Phillips Co.,* 296 U. S. 27 (1935), clearly held that the decision of an intermediate Appellate Court in Illinois construing the Negotiable Instrument Law was not binding upon the federal court sitting in Illinois. Mr. Justice McReynolds said at p. 30:

> "Petitioner insists, that under the authoritative construction placed upon the Illinois Negotiable Instrument Law by her Supreme Court, since respondent had received information of the defective title, there was bad faith as matter of law, and no title passed. He strongly relies upon *Northwestern National Bank v. Madison & Kedzie State Bank,* 242 Ill. App. 22, and the denial of certiorari therein.

"Under *Burns Mortgage Co. v. Fried,* 292 U. S. 487, a definite construction of the negotiable instrument law by the State Supreme Court, binding upon the local tribunals, must be accepted by the federal courts. But we cannot think that the ruling and action in the *Northwestern Bank* case amount to such a construction. That cause, decided by the Appellate Court, First Division, October, 1926, involved title to stolen bonds held by one claiming as a bona fide purchaser, after receipt of notice of the theft. The court there said: 'The notice having been received by the proper agent of the bank to receive, open and acknowledge its mail in the line of his duties, we think the bank is estopped from claiming that it did not have actual knowledge of the defect in the title to the bonds it subsequently received.' The State Supreme Court denied an application for certiorari without more. The argument is that this amounted to approval of the construction placed upon the statute by the Appellate Court. The point is not well taken.

"*National Bank v. Uptown State Bank,* 273 Ill. App. 401, (1934) construed the statute differently, and made no reference to the earlier case. We cannot know upon what ground certiorari was denied. The Illinois Supreme Court has declared that 'Whether one has notice of a certain fact is a question of fact and not of law'; *Paine v. Sheridan Trust & Savings Bank,* 342 Ill. 342, 348; 174 N. E. 368; also that denial of certiorari does not import approval of the reasons assigned by the lower court. *People ex rel. Hoyne v. Grant,* 283 Ill. 391, 397; 119 N. E. 344.

"The Appellate Courts in Illinois are inferior tribunals and a statute provided that their opinions 'shall not be binding authority in any case or proceeding other than that in which they may be filed.' *Illinois Constitution,* 1870; Article VI, § 11; *Cahill's Illinois Rev. Stats.* 1933, c. 37, par. 49.

"*No authoritative construction of the negotiable instrument law of Illinois supports petitioner's position. And the court below rightly undertook to determine for itself the meaning and effect of the pertinent sections.*" (Italics supplied.)

2. Even if the rule of Erie Railroad v. Tompkins were to be extended it ought not to include decisions by the Courts of Appeals of Ohio.

There are nine Courts of Appeals in Ohio, each having jurisdiction in a particular district. The Eighth District has jurisdiction in only a single county, namely, Cuyahoga. It has no jurisdiction over suits brought in the other eighty-seven counties of the state. Its judgments are final except in cases involving questions under the State or Federal Constitution and "cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court." Ohio Constitution, Article IV, Section 6. In practice this means that the Supreme Court can, by granting a motion to certify, review practically any case decided by any Court of Appeals.

The decisions of the Court of Appeals of Cuyahoga County are not binding upon the courts of the other eighty-seven counties of Ohio but are of persuasive authority only. Common Pleas judges of the other 87 counties and the Courts of Appeals of the other eight districts are under no obligation to accord the opinion in *West v. American Telephone and Telegraph Company* any greater weight than its reasoning compels. Nor does the fact that a motion to certify this decision was denied by the Ohio Supreme Court add to its authority. *Village of Brewster v. Hill,* 120 O. S. 343 (1929). As Judge Allen, formerly a judge of the Supreme Court of Ohio, said in the present case:

> "The settled rule in Ohio is that the Supreme Court, by denial of motion to certify the record, lays down no law." (R. 140.)

The only Ohio court, therefore, that is bound by the decision of the Court of Appeals of Cuyahoga County is the Common Pleas Court of that county. If the plaintiffs' claim in this case is recognized it will mean that the decision of the Ohio Court of Appeals of Cuyahoga County can be ignored by the courts of eighty-seven of eighty-eight

counties in Ohio, as it can by the Supreme Court of Ohio, but will be binding upon justices of the peace, municipal courts and the Common Pleas Court of Cuyahoga County and upon all the federal courts, including the highest.

Moreover, it means that a plain misinterpretation and misconstruction of the decisions of the Supreme Court of Ohio incorporated in the opinion in this case can be corrected in a later case in practically all the courts of Ohio but cannot be corrected by any of the federal courts.

Finally, it means, as the Circuit Court of Appeals said, that a decision proceeding upon a misunderstanding of a former decision of the Sixth Circuit Court of Appeals cannot be corrected by that court or by this Court.

There are other consequences of moment implicit in the acceptance of the plaintiffs' views. Prior to *Erie Railroad v. Tompkins* it was customary for parties who benefited by the rule in federal courts differing from the rule applied in state courts of their jurisdiction to sue in the former for the very purpose of avoiding state law. To stop this was one of the principal reasons for the rule of *Erie Railroad v. Tompkins*. If the rule sought by the plaintiffs were put in effect every cause of action supported by a doubtful decision of a Court of Appeals of Ohio would be brought in the federal court where diversity or other jurisdictional ground existed for the very purpose of preventing the Ohio courts from correcting the unsound rule. In such cases the parties claiming the benefit of the rule could feel confident under such a doctrine that even this Court could not change the rule although most of the courts of their own state might. In this case it is proper to ask why these plaintiffs did not bring their second suit in the state courts as they did the first.

We point out further that the District Court for the Eastern Division of the Northern District of Ohio has jurisdiction in some nineteen counties. These same nineteen counties include all or parts of the territorial jurisdic-

tion of three Ohio Courts of Appeals. Under the rule advocated by the petitioners a single judge sitting in the Eastern Division of the Northern District of Ohio might conceivably have three different rules of law from which to choose as announced by the three Ohio Courts of Appeals in his district. And why stop here? If each Court of Appeals in Ohio can declare the law of the state binding on the federal court theoretically there could be nine such decisions from which the District Judge might choose. To this tangle there would be no solution except the adoption of rules of conflict of laws to be applied to the decisions of the various Courts of Appeals. We suggest that the complexities arising out of the interrelation of the state and federal sovereignties are great enough as it is without multiplying them many fold by giving to decisions of the Ohio Courts of Appeals an effect wholly beyond any accorded them in the State of Ohio.

Certainly nothing heretofore decided by this Court warrants the claim here made that while a Justice of the Peace in Youngstown, Ohio, is free to make an independent examination and apply a rule of law at variance to one announced by the Court of Appeals of Cuyahoga County, neither the United States District Court nor the United States Circuit Court of Appeals nor the Supreme Court of the United States may do so.

Nothing herein said is intended to reduce the persuasive authority of the sound decisions of the lower courts of Ohio. It is recognized that not infrequently the most complete and thorough consideration of a legal question is found in the opinion of an inferior court. Both the judiciary and the bar have always accorded to such decisions the weight to which their merits entitle them.

If the rule be that the state law is to be found either in the statutes or decisions of the highest court of the state the federal courts can still give to the decisions of lower courts all of the effect to which their merits entitle them.

3. The opinion of the Ohio Court of Appeals in this case cannot be accepted by the federal courts without (a) denying full faith and credit to the judgment rendered in the same case and (b) perpetuating a plain misconstruction of well settled Ohio law.

We have already pointed out that the judgment of the Ohio Court of Appeals was a judgment on the merits in favor of the defendant and that such a judgment is inconsistent with the plaintiffs' interpretation of the unfiled opinion of that court.

The full faith and credit clause of the Federal Constitution, applicable only to the state courts, has been extended by statute to the federal courts. The rule has been recently stated in *Davis v. Davis,* 305 U. S. 32 (1939), by Mr. Justice Butler as follows:

> "Art. IV, § 1, requires that judicial proceedings in each State shall be given full faith and credit in the courts of every other state. The Act of May 26, 1790, 1 Stat. 122, as amended, R. S. § 905, 28 U. S. C. § 687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every 'court within the United States as they have by law or usage in the courts of the State from which they are taken.' Thus Congress rightly interpreted the clause to mean, not some, but full credit. *Haddock v. Haddock, supra,* 567. The Act extended the rule of the Constitution to all courts, federal as well as state. *Mills v. Duryee,* 7 Cr. 481, 485." (p. 39.)

It follows that if the rule of *Erie Railroad v. Tompkins* requires the federal courts in this case to accept the unfiled opinion of the Ohio Court of Appeals as correctly stating the settled law of the state it will by so doing, at the same time, deny full faith and credit to the judgment of the Ohio Court of Appeals in that same case. As previously noted it will perpetuate a misapplication of well settled decisions of the Ohio Supreme Court.

That this judgment itself is a bar and a complete defense in this action is elsewhere argued in this brief.

VI.

PLAINTIFFS' CLAIMS AS TO THE RELIEF ARE WHOLLY UNWARRANTED.

While this case can be fully diposed of on preceding points, professional duty probably requires that a word be said about the claims on pages 29 to 47 of the plaintiffs' brief as to the relief and damages to which the plaintiffs believe themselves entitled.

The District Judge entered a decree directing the defendant to deposit 92 shares of its common stock in trust, the dividends to be paid to the defendant during the life of Grace C. West and the stock at her death to be distributed to the plaintiffs in accordance with the will (R. 125). This decree would have given the plaintiffs exactly what their father's will provided.

But the plaintiffs are not satisfied with this. They ask that they be given 92 shares immediately and that in addition they be awarded dividends and damages, plus interest, in an amount which, if invested in the defendant's stock at the time of trial, would give the plaintiffs about 160 shares more. Thus they seek the assistance of equity to secure the immediate enjoyment of more than 250 shares of common stock in lieu of the remainder of 92 shares which their father left them.

The theory upon which these extravagant claims are based is that if a life tenant in whose name corporate stock stands sells it and assigns the complete interest he thereby forfeits the life estate and the remainder is immediately accelerated.

There are several short answers to this claim as follows:

1. The doctrine of forfeiture of a life estate because of a tortious conveyance was a doctrine of feudal law applicable only to real estate and then only to conveyances by livery of seisin. *Greenleaf's Cruise on Real Property,* Vol. 1, pages 108-9.

In *Carpenter v. Denoon,* 29 O. S. 379 (1876), at page 398 the Supreme Court of Ohio said:

> "This doctrine of the common law, which had its origin and reason in the feudal system, has never, as far as we know, been recognized in this state, nor do we think there is any good reason for maintaining it under our system. 4 *Kent Com.* 83, 84; 3 Dallas, 486; 1 B. Mon. 88; 11 Conn. 553; 40 Maine, 528."

The plaintiffs rely upon New York and Massachusetts cases which are in no sense illustrations of the doctrine. In both of those states remnants of the doctrine as applied to real estate were abolished by statute at an early date. *Laws of Massachusetts,* Chapter 184, Section 9; *New York Real Property Law,* Section 247. Similar statutes as to personal property were not necessary since the doctrine was never applied to personal property even in England.

The Massachusetts cases cited by the plaintiffs (Brief p. 30) are cases of ordinary common law waste. The Kentucky cases cited by the plaintiffs (Brief pp. 30-31) were both cases where suit was brought by a remainderman after the death of the life tenant and no question of forfeiture of a life estate was or could be involved. The Ohio Common Pleas decision cited (Brief p. 31) is fully distinguished in the opinion of the District Court (R. 119-20).

2. What the plaintiffs ask the court of equity to do by their present claims is to enforce a forfeiture. Usually equity is asked to and does *relieve* from forfeiture.

The most frequently quoted statement as to the attitude of equity toward a forfeiture is that of Mr. Justice Swayne in *Marshall v. Vicksburg,* 15 Wall. 146 (1872), when he said at page 149:

> "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either."

3. If the doctrine of *Erie Railroad v. Tompkins* requires this Court to follow the opinion of the Ohio Court of

Appeals, as the plaintiffs claim, that opinion holds that there was in this case no forfeiture of the life estate (R. 75). The District Court likewise examined the claims as to forfeiture and rejected them (R. 119-20). The Circuit Court of Appeals did not find it necessary to consider them (R. 143).

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed for each of the following independent reasons: (a) because the defendant was guilty of no wrong, (b) because the action is barred by the statute of limitations, (c) because the action is barred by laches, and (d) because the judgment of the Ohio Court of Appeals in favor of the defendant is *res adjudicata*. The question whether a decision of an Ohio Court of Appeals is a determination of state law binding upon the federal courts is not, we submit, necessarily involved in this case, but if it is to be decided, the rule should be that such a decision is not binding.

Respectfully submitted,

WILLIAM B. COCKLEY,

Attorney for the American Telephone & Telegraph Company.

pp. 3, 5, 7

SUPREME COURT OF THE UNITED STATES.

Nos. 44, 45.—October Term, 1940.

Charles Peyton West and Maurice John West, Petitioners.
44 *vs.*
American Telephone and Telegraph Co.

Charles Peyton West and Maurice John West, Petitioners.
45 *vs.*
American Telephone and Telegraph Co.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 9, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The Circuit Court of Appeals in this case, in which jurisdiction rests exclusively on diversity of citizenship, declined to follow the ruling in *West* v. *American Telephone & Telegraph Co.*, 54 Ohio App. 369, 7 Ohio Opinions 363, of the Cuyahoga County Court of Appeals, an intermediate appellate court of Ohio. The question for decision is whether, in refusing to follow the rule of law announced by the state court, the court below failed to apply state law within the requirement of § 34 of the Judiciary Act of 1789 and of our decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

In 1926 an Ohio decedent, domiciled at death in Cuyahoga County, bequeathed his estate, including ninety-two shares of the common stock of respondent, to his widow for life, with remainder to petitioners, the sons of decedent's first wife, who was the sister of his widow. February 2, 1927, the widow tendered to respondent, for transfer, certificates for the ninety-two shares of stock standing in decedent's name, each endorsed with an assignment of the shares evidenced by the certificate, to the widow, signed in her name as executrix of decedent's estate. Accompanying the certificate were duly attested documents as follows: A copy of decedent's will, a certificate of the Cuyahoga County Probate Court of the qualification of the widow as executrix under the will; copy of an applica-

tion of the executrix for the distribution in kind of the estate, consisting of specified corporate stocks including the ninety-two shares of respondent's stock, with the appended consent of petitioners to the distribution in kind, and a copy of the journal of the probate court showing that it had granted the application and ordered the distribution.

Thereupon respondent issued a new certificate for the ninety-two shares in the name of the widow which did not disclose her limited interest as life tenant or that of petitioners as remaindermen. October 31, 1929 the widow endorsed and delivered the certificate as collateral security for her brokerage account to a stock broker to whom respondent issued a new certificate in his name as stockholder on November 4, 1929. In March, 1934, petitioners first learned of this disposition of the shares by the widow and in June, 1934, brought suit against respondent in the Cuyahoga County Court of Common Pleas, seeking recovery of damages for the wrongful transfer of the shares. In addition to defenses on the merits respondent set up the Ohio four-year statute of limitations. After a trial on the merits the trial court gave judgment for petitioners, which the Cuyahoga County Court of Appeals reversed. The state Supreme Court denied petitioners' motion to require the court of appeals to certify its record to the Supreme Court for review because of "probable error" in the case, after which the Court of Common Pleas entered "final judgment against appellees [petitioners here] and in favor of appellant [respondent here]" upon the mandate of the Court of Appeals stating "the judgment of the Court of Common Pleas is reversed for reasons stated in opinion on file and final judgment is hereby rendered for appellant, no error appearing in the record." The opinion of the appellate court was not filed but copies were furnished counsel and it appears of record.

The state court of appeals held that upon the tender for transfer of the certificates of stock by the executrix it was the duty of respondent to issue a new certificate showing on its face the respective interests of the life tenant and of the petitioners as remaindermen; that the transfer of the shares by respondent to the broker without the endorsement of the certificate by petitioners was unauthorized and wrongful; that the unlawful disposition of the stock by the life tenant did not terminate the life interest or accelerate the rights of

the remaindermen, but that the refusal of respondent after demand by petitioner to recognize and reestablish petitioners' rights in the stock, or other stock of equal par value, was a conversion of it entitling petitioners to damages to the extent of the value of their interest in the stock or to a decree of restitution directing respondent to issue a new certificate for the ninety-two shares in such manner as would protect the respective interests of all parties.

Construing the relevant provisions of the Ohio Uniform Stock Transfer Act (Ohio G. C., §§ 8673-~~1.6.7.17.30~~) the court held that as a prerequisite to recovery for conversion of petitioners' interest in the stock it was necessary that respondent repudiate petitioners' title and that the petitioners should allege and prove that respondent had refused to recognize petitioners' right in the stock and to issue an appropriate certificate for it. As petitioner had failed to allege or prove any demand on respondent or any refusal by it in advance of suit to recognize petitioners' rights or to issue an appropriate certificate, the court directed judgment for respondent in conformity to its mandate.

On June 18, 1937, following the denial of petitioners' motion by the state Supreme Court, in January, 1937, petitioners made demand on respondent, the sufficiency of which is not questioned, to restore to petitioners their rights in the shares, and on July 14, 1937, petitioners brought the present suit in the federal district court for Northern Ohio. The bill of complaint, after alleging the facts already mentioned which the state court had found to establish the wrongful transfer of the stock by respondent and after reciting the course and results of the litigation in the state courts and the demand on respondent, set up petitioners' right to relief according to the decisions of the state courts and prayed judgment that respondent issue to petitioners a certificate for the ninety-two shares of stock and for back dividends with interest, and damages, and generally for other relief.

The trial court found that the cause of action did not accrue until the demand made upon respondent; that suit was not barred by the prior adjudication in the state court since that suit, in which no demand was alleged or proved, was on a different cause of action from that now asserted; that it was not barred by limitations or laches and that the remainder interests had not been accelerated by the wrongful disposition and transfer of the stock. It accordingly decreed

that respondent procure by purchase or otherwise ninety-two shares of its common stock, issue a certificate for it to a trustee, which was directed to hold the stock during the lifetime of the widow for the benefit of respondent and upon her death to make distribution of it to the remaindermen as directed by the will.

The Court of Appeals for the Sixth Circuit dismissed the appeal of petitioners raising questions not now material and on the appeal of the respondent, reversed the decree of the district court, 108 F. (2d) 347. It held contrary to the ruling of the state court that demand upon respondent was not prerequisite to the accrual of petitioners' cause of action and that petitioners' right of recovery was barred by limitations and laches. We granted certiorari, 310 U. S. 618, upon a petition which set up that the Court of Appeals had erroneously failed to apply the Ohio law with respect to the necessity for a demand as defined by the state court of appeals in the litigation between the present parties and that the court below had erroneously applied the Ohio rule of limitations and of laches, all questions of public importance concerning the interrelation of state and federal courts.

The court below thought that demand was not an essential part of the cause of action where the suit was brought by remaindermen not entitled to possession of the stock certificate, consequently that the district court had erred in following the ruling of the state court of appeals and that both had misconstrued and misapplied an earlier decision of the court below in *American Steel Foundries* v. *Hunt*, 79 F. (2d) 558, where demand was held to be prerequisite to a suit brought by one who had acquired shares by purchase but had failed to present the endorsed certificate to the corporation for transfer before bringing suit. It cited decisions of similar purport by the Ohio Supreme Court but recognized that the only Ohio case passing upon the question whether demand is prerequisite to suit in the case of a remainderman is the decision of the state court of appeals in *West* v. *American Telephone & Telegraph Co.*, *supra*. It held that it was not bound to follow the decision of an intermediate appellate court of the state and so was free to adopt and apply what it considered to be the better rule that demand is unnecessary and consequently is not a part of the petitioners' cause of action. From this it concluded that the cause of action which it thought had accrued in 1927 when the stock certificate was issued to the life tenant, was barred by the four-year statute of limitations

applicable to causes of action "for an injury to the rights of the plaintiff not arising on contract . . ." § 11224 Ohio G. C., or by laches if demand were necessary.

Since the equitable relief sought in this suit is predicated upon petitioners' legal rights growing out of respondent's unlawful transfer of the stock to the assignee of the life tenant, the state "laws" which, by § 34 of the Judiciary Act of 1789 c. 20, 28 U. S. C., § 725, are made "the rules of decision in trials at common law" define the nature and extent of petitioners' right. See *Russell* v. *Todd*, 309 U. S. 280, 289. And the rules of decision established by judicial decisions of state courts are "laws" as well as those prescribed by statute. *Erie Railroad Co.* v. *Tompkins, supra*, 78. True, as was intimated in the *Erie Railroad* case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. See *Wichita Royalty Co.* v. *City National Bank of Wichita Falls*, 306 U. S. 103, 107. But the obvious purpose of § 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.

A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much it may have departed from prior decisions of the federal courts. See *Erie Railroad Co.* v. *Tompkins, supra*, 78; *Russell* v. *Todd, supra*, 293.

the State rule

Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *Six Companies of California* v. *Joint Highway District,* No. 267, decided this day; *Fidelity Union Trust Co.* v. *Field,* No. 32, decided this day: Cf. *Graham* v. *White-Phillips Co.,* 296 U. S. 27; *Wichita Royalty Co.* v. *City National Bank, supra,* 107; *Russell* v. *Todd, supra.* This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. True, some other court of appeals of Ohio may in some other case arrive at a different conclusion and the Supreme Court of Ohio, notwithstanding its refusal to review the state decision against the petitioner may hold itself free to modify or reject the ruling thus announced. *Village of Brewster* v. *Hill,* 128 O. S. 343, 353.[1] Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the *West* case, whether that will ever happen remains a matter of conjecture. In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had. If the present suit had been brought in the Cuyahoga county court no reason is advanced for supposing that the Cuyahoga court of appeals would depart from its previous ruling or that the Supreme Court of the state would grant the review which it withheld before. We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation.

[1] Article IV, § 6 of the Ohio Constitution provides that: "Judgments of courts of appeal shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of this state . . . , and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court . . . and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

Whether the state court of appeals in the first suit defined the cause of action as arising out of the failure of respondent to describe correctly the interests of the parties, in the certificate issued to the widow in 1927, or out of the wrongful transfer in 1929, is immaterial to the question of the period of limitation. In either case, since the cause of action under the Ohio law did not arise until demand which was either on June 2, 1934, when the suit was brought in the state court, or June 18, 1937, when the formal demand was made, the statute of limitations did not begin to run until one or the other of those dates. See *Keithler* v. *Foster*, 22 Ohio St. 27. It is unnecessary to decide whether, as petitioners contend, the suit was on contract or statutory liability to which the six-year statute applies, § 11222, Ohio G. C., or "for the recovery of personal property or for taking or detaining it," in which case the cause of action is not deemed to accrue "until the wrongdoer is discovered . . ." § 11224, Ohio G. C., see *Railroad Co.* v. *Robbins*, 35 Ohio St. 483, 502, or whether as the court below held the cause of action was "for injury to the rights of the plaintiff not arising on contract . . .", in which case the statute runs from the date of the injury when demand is not required. § 11224, Ohio G. C. For in any event since, under Ohio law no cause of action arose until demand was made, the four-year period would run either from the date of the first suit, or from that of the formal demand, and had not expired on July 14, 1937, when the present suit was commenced in the district court.

The court below also held that if demand were to be deemed a prerequisite to suit petitioners were barred by their "unnecessary delay" in making it, citing *Keithler* v. *Foster*, *supra*, for the proposition that demand must be made within four years after the cause arose (1927 or 1929), the time limited by the statute for bringing an action if no demand were necessary. But the Supreme Court in that case thought it correct to apply the rule relied upon by the circuit court of appeals only when "no cause for delay can be shown." Cf. *Stearns* v. *Hibben Dry Goods Co.*, 11 Ohio C. C. (N.S.) 553; affirmed 84 Ohio St. 470. Here no special circumstances are shown for limiting the time of demand or shortening the statutory period after demand.[2] Both the state court and

[2] In Keithler v. Foster, 22 Ohio St. 27, the demand on a sheriff for moneys collected on an execution sale in 1855 was not made until 1867. The Supreme Court in holding that the suit brought on the sheriff's bond in 1868 was not barred by the ten year statute of limitations said that where "the statute begins to run, in cases like this, from the time of demand, it would be but reasonable to hold, in the absence of other special circumstances, when no demand is

the district court in this case have ruled that petitioners are not estopped by their consent to distribution which both courts interpreted as a consent only to a lawful distribution by a lawful procedure. The district court also found that the evidence relied upon to show lack of diligence on the part of petitioners in prosecuting inquiries which would have disclosed the unlawful transfer failed of its purpose and was insufficient to establish either estoppel or laches. At most the evidence shows that in 1930 one of the petitioners became suspicious that the life tenant had suffered losses in the stock market and made inquiry of one corporation whose stock was included in the estate only to learn that the stock certificate had been properly issued to the widow as life tenant of the estate and that he made no further inquiries. The record is barren of any evidence to suggest that petitioners had any ground for suspicion that respondent had issued the certificate to the life tenant in any improper or unlawful form before March, 1934, when they discovered the misappropriation of the stock. They brought suit in the state court the following June. We think there was no want of diligence on the part of petitioners in presenting and prosecuting their demand and that the findings of the trial court are supported by the evidence and should not have been disturbed.

The judgment will be reversed, but as other points involving questions of state law argued here were not passed upon by the Court of Appeals the cause will be remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

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shown to have been made within the statutory period for bringing the action, that, for the purpose of setting the statute in operation, a demand will be presumed at the expiration of that period, from which the statute will begin to run."

In Douglas *v.* Corry, 46 Ohio St. 349; Townsend *v.* Eichelberger, 51 Ohio St. 213, on which respondent relies, no suit was brought until after the expiration of the additional limitation period after the demand was made or presumed as in Keithler *v.* Foster, *supra*.

Here, even if demand were presumed at the end of a four year period, which began to run either in 1927 or 1929, the state court action was timely when begun on June 2, 1934. It was dismissed in February, 1937. The present action was begun in July, 1937. § 11233 of the Ohio G. C. provides: "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff . . . may commence a new action within one year after such date. . . ."

SUPREME COURT OF THE UNITED STATES.

Nos. 44, 45.—October Term, 1940.

Charles Peyton West and Maurice John West, Petitioners, 44 *vs.* American Telephone and Telegraph Co. Charles Peyton West and Maurice John West, Petitioners, 45 *vs.* American Telephone and Telegraph Co.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 9, 1940.]

Mr. Justice Roberts.

I concur in the opinion of the court in so far as it holds that the Circuit Court of Appeals should have treated the decision of the Cuyahoga County Court of Appeals, under the circumstances of this case, as expressing the law of Ohio with respect to the necessity of a demand prior to institution of suit. I do not, however, agree that the judgment should be reversed.

I am unable to say that the court below erred in holding that, under Ohio law, the four-year period of limitations applied to petitioners' cause of action, and that delay of demand for more than four years after the cause of action accrued barred the suit. Both holdings seem to me to be supported by decisions of the Ohio courts; *Keithler* v. *Foster,* 22 Oh. St. 27; *Douglas* v. *Corry,* 46 Oh. St. 349; *Townsend* v. *Eichelberger,* 51 Oh. St. 213; *Stearns* v. *Hibben Dry Goods Co.,* 11 Oh. C. C. (N. S.) 553, 31 Oh. C. C. 270; affirmed 84 Oh. St. 470. There is here no place for any presumption of demand, as in *Keithler* v. *Foster,* for here the suit in the state court was dismissed on the express ground that no demand had in fact been made; and in the present suit in the United States District Court the averment of the complaint is that demand was made June 18, 1937, at least eight years after the cause of action accrued. In such circumstances, as the other cited cases show, a demand

made at a date beyond the period of limitations, does not toll the statute. In the *Douglas* case the averment was that demand was made nine years after the cause of action accrued and suit was brought within four years thereafter. In the *Stearns* case it was alleged demand was made four years and nine months after accrual of cause of action, and suit begun within four years thereafter. The statute of limitations was held a bar in both.

Though the action was in equity, an action at law might have been maintained (*Stearns* v. *Hibben Dry Goods Co., supra; Russell* v. *Todd,* 309 U. S. 280, 289), and the statute governing such an action is applicable.

Not only have petitioners failed to show "special circumstances" justifying their delay in making demand (*Keithler* v. *Foster, supra*), but the court below has held they were guilty of laches, an independent ground of decision, which, though the question be a close one, we ought not, under our settled practice, to reexamine.

For these reasons I think that, despite the erroneous view of the Circuit Court of Appeals as to the law of Ohio on the point decided by the State Court of Appeals, the judgment should be affirmed.